73-6

KRYNSKI VS. ROBERT S. MARTIN

ABST

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-three, within and for the Third District of Illinois:

Present—

+ HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on JULY 17, 1973 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 73-6

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1973.

JOHN E. KRYNSKI, Plaintiff-Appellant,	)	
vs.	)	
ROBERT S. MARTIN, Defendant and Third Party Plaintiff-Appellee,	)	Appeal from the Circuit Court of Rock Island County
vs.	)	
DAN KRYSNKI, Third Party Defendant.	)	Honorable Henry W. McNeal Presiding Associate Judge.
ROBERT S. MARTIN, Plaintiff-Appellee,	)	
vs.	)	
DAN KRYNSKI, Defendant-Appellant.	)	

Abstract

MR. PRESIDING JUSTICE ALLOY delivered the opinion of the court:

This is an appeal from one judgment in favor of Robert S. Martin and as against Dan Krynski for $186.44 in damages sustained to the Martin car, and also from another judgment in favor of Robert S. Martin, as defendant, in an action filed by John E. Krynski, owner of the automobile being driven by Dan Krynski. The cases were consolidated for bench trial, after Robert S. Martin had denied liability in the action filed by John E. Krynski and Martin had filed a third party complaint as against Dan Krynski. The appeals by John E. Krynski and Dan Krynski are based on a contention that Robert S. Martin was guilty of negligence (and contributory negligence) as a matter of law.

The record discloses that Robert S. Martin was driving his own automobile eastward on 23rd Avenue near its intersection with 44th Street in Moline, Illinois, on September 18, 1971. 23rd Avenue is a paved 4-lane highway running

in an east-west direction with two lanes of traffic in each direction separated by a median strip. Robert S. Martin was driving in the lane nearest the median strip. The speed limit on 23rd Avenue was 40 miles per hour at the time. The traffic was light, and while it was overcast, no rain was falling at the time, although the pavement was damp from an earlier rain. Dan Krynski, 21 years of age, was driving a 1963 Ford Mustang automobile owned by his father, John E. Krynski. Dan Krynski was accompanied by his 20 year old girl friend, Mary Ann Urbaniak.

The record shows that Dan Krynski pulled away from a root beer stand located near the intersection of 23rd Avenue between 44th and 45th Streets and drove across two lanes of westbound traffic and into the inside eastbound lane of 23rd Avenue nearest the median. While Dan Krynski was attempting to complete his left-hand turn, or had completed it, his automobile was struck in the rear by the automobile driven by Robert S. Martin. Martin testified that he was traveling within the speed limit and suddenly saw the red Krynski automobile some 35 to 50 feet ahead of him. Robert S. Martin testified that upon seeing the Krynski car he looked to his right to determine if he could change to the outside lane and, seeing that the outside lane was occupied applied his brakes, but was unable to avoid colliding with the Krynski car. He was traveling between 20 and 30 miles per hour when he struck the Krynski car. The Krynski automobile was going at a slightly slower speed at the time.

Dan Krynski testified that he saw the Martin car approximately 500 to 600 feet to the west when he left the root beer stand exit and also stated that he had completed his turn into the lane occupied by the Martin car and was proceeding east when his automobile was struck in the rear by the Martin car. He stated that he was unaware of the impending accident until after his car had been struck in the rear. His girl friend corroborated Dan Krynski's testimony.

As the sole assigned reason in support of defendants' requests for reversal or remandment, it is asserted that Robert S. Martin was guilty of negligence as a matter of law. Appellants contend that when Robert S. Martin stated that he

first looked to his right to determine if he could change to the other lane and then applied his brakes, when he found he could not turn into the other lane, that such testimony was evidence, in and of itself, of negligence on the part of Robert S. Martin. It is asserted that the testimony constituted a judicial admission of negligence. It is contended, therefore, that the finding of the trial court that Robert S. Martin was not guilty of negligence or contributory negligence was contrary to the manifest weight of the evidence.

It is clear from the evidence that Dan Krynski in entering upon 23rd Avenue and making the left turn into the lane in which Robert S. Martin was driving his car, was not permitted to do so unless he could enter such portion of the highway without interfering with the normal flow of traffic. (1971 Ill. Rev. Statutes, ch. 95-1/2, §11-906). The trial court could properly have found that Dan Krynski was guilty of negligence in failing to yield the right of way to Martin. The only question posed in the cause on appeal is whether the testimony of Robert S. Martin referred to established that Martin himself was negligent. The trial court as the trier of facts in this cause was able to observe the witnesses and weigh the testimony of the witnesses in determining whether Robert S. Martin was guilty of negligence. The testimony of Robert S. Martin obviously indicated that he felt he was confronted with an emergency in which he sought to avoid colliding with the rear end of the Krynski car. If the other lane was open and Robert S. Martin did not look to see if he could avoid the collision by moving into that lane, the court might have found that failure to be the basis for a finding of negligence on the part of Robert S. Martin. Apparently, however, Martin may have made every reasonable effort to determine whether he could avoid the collision, and, on the record, looked to the other lane and, also, applied his brakes but was unable to avoid colliding with the rear end of the Krynski car. Certainly, on the basis of the record it became a question of fact for the trial court to determine this issue of negligence in the cause.

There was nothing in the testimony of Robert S. Martin which unequivocally showed that Robert S. Martin was guilty of negligence as a matter of law, nor did it constitute a judicial admission of negligence by Martin. (McCORMACK v. HAAN, 20 Ill. 2d 75, 169 N.E. 2d 239). Martin simply told of his actions at the time of seeing the unanticipated presence of the Krynski car. An issue of fact was presented for the trial court. The trier of fact could evaluate Martin's testimony in the light of all circumstances and the testimony of other witnesses. A finding by the trial court that Martin delayed too long in applying his brakes would be required to be approved on appeal. The contrary finding that he was not negligent is also required to be approved by this court on appeal. The finding of the trial court in a bench trial is entitled to the same weight as a jury verdict. (BALFOUR v. BALFOUR, 20 Ill. 2d 601, 156 N.E. 2d 629). We find no basis for a conclusion that the finding of the trial judge was clearly against the manifest weight of the evidence in this cause.

The judgment of the circuit court of Rock Island County is, therefore, affirmed.

Affirmed.

Stouder and Dixon, JJ. concur.

No. 72-48

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Madison County.
vs.	)	
CHARLES LEE DAVIS, Defendant-Appellant.	)	Honorable William L. Beatty, Judge Presiding.

PER CURIAM:

Appellant pleaded guilty, after proper admonitions, to charges of attempted murder and voluntary manslaughter and, pursuant to a negotiated plea, received concurrent sentences of from eight to twenty years.

Appellant's first contention is that he was denied his right to a preliminary hearing under Article 1, section 7 of the Constitution of 1970. It appears from the record that appellant was indicted within a week after he was arrested and that his arrest occurred just prior to the Independence Day holiday. In view of the subsequent proper indictment, the issue of denial of the right to preliminary hearing is of a non-jurisdictional nature and was waived by appellant's voluntary guilty plea (People v. Stanley, 50 Ill.2d 320, 278 N.E.2d 792; People v. Mendoza, 48 Ill.2d 371, 270 N.E. 2d 30).

Appellant next contends that he was improperly sentenced twice for the same transaction, now prohibited by chapter 38, section 1-7(m), Ill.Rev.Stat. It is clear from the record, however, that appellant's acts clearly constituted two separate offenses. Two victims were involved and there was significant time, though short, between the culmination of the first act and initiation of the second. In view of these facts and appellant's concurrence in the negotiated plea and sentence, the trial court did not err in imposing separate concurrent sentences for the offenses committed.

Appellant also contends that the sentences imposed were excessive. Under the Unified Code of Corrections, attempted murder is a Class 1 felony, punishable by

a minimum of four years and an indefinite maximum. The minimum shall be four years unless the trial court sets a higher minimum having regard to factors surrounding the offense and offender (Ill. Rev. Stat. ch. 38, par. 1005-8-1(c)(1)). Voluntary manslaughter is listed as a Class 2 felony with a prescribed penalty of from one to twenty years. The minimum to be set shall be one year unless the trial court sets a higher minimum having regard to surrounding factors. Furthermore, the minimum shall not exceed one-third of the maximum (Ill. Rev. Stat. ch. 38, par. 1005-8-1(c)(3)). It is clear in the instant case that the sentences imposed do not comport with the provisions of the Code. The judgment upon the convictions are affirmed and the cause remanded to the circuit court of Madison County for resentencing pursuant to the Unified Code of Corrections.

Affirmed; Remanded for resentencing.

PUBLISH ABSTRACT ONLY.

No. 72-274

13 I.A.3 45

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	Appeal from the Circuit Court of Madison County.
vs.	
GLEN MORDIS, Defendant-Appellant.	Honorable John Gitchoff, Judge Presiding.

PER CURIAM:

Appellant and two others were indicted for murder stemming from a killing in Madison County. After proper admonitions by the trial court, appellant was allowed to enter a plea of guilty to the reduced charge of involuntary manslaughter. One of the other defendants had previously been convicted of murder. Appellant's motion for probation was denied and a sentence of one to six years was imposed. Appeal here is based solely on the denial of the motion for probation.

It is clear that had appellant been convicted of murder, the offense with which he was charged, probation would have been unavailable to him (Ill.Rev.Stat. ch. 38, par. 1005-5-3(g)). It is further clear that a trial court is bound to impose a sentence of imprisonment where probation would "deprecate seriousness of the offender's conduct and would be inconsistent with the ends of justice" (Ill.Rev.Stat. ch. 38, par. 1005-6-1(a)(3)). While it is true that the appellant in the instant case pleaded guilty to involuntary manslaughter after the State moved for reduction of the charge of murder, this point should not cloud the ultimate fact that a human being is dead from the admitted conduct of the appellant and others. In light of this, we cannot say that the trial court abused its discretion in denying appellant's motion for probation and imposing a sentence of from one to six years. This sentence, furthermore, fully comports with the requirements of the Unified Corrections Code (Ill.Rev.Stat. ch. 38, par. 1005-8-1(c)(3)).

The judgment of the circuit court of Madison County is affirmed.

Affirmed.

PUBLISH ABSTRACT ONLY.

13 I.A. 3 60

General No. 12102 Agenda No. 73-151

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

RONALD DORAN, Plaintiff-Appellant vs MERCANTILE TRUST AND SAVINGS BANK, an Illinois banking institution, Defendant-Appellee MERCANTILE TRUST AND SAVINGS BANK, an Illinois banking institution, Third Party Plaintiff vs LINDA DORAN AND JOHN T. ENNIS, Administrator to Collect for the Estate of Harry S. Severns, deceased, Third Party Defendants-Appellees	Appeal from Circuit Court Adams County

MR. JUSTICE SIMKINS delivered the Opinion of the Court.

This case was tried before a jury which returned a verdict in favor of the plaintiff-appellant Ronald Doran and against the defendant-appellee Mercantile Trust and Savings Bank in the amount of $2598.33. The jury also returned a verdict in favor of Mercantile Trust and Savings Bank, in the amount of $2598.33, on its third party complaint against the third party defendants-appellees Linda Doran and Harry A. Severns. The trial judge then entered judgment notwithstanding the verdict in the suit by Ronald Doran against the Bank and the plaintiff Ronald Doran appeals from that judgment. The trial judge also entered judgment notwithstanding the verdict in the case of the Bank against Linda Doran and Harry A. Severns but there is no appeal from that judgment.

The plaintiff's complaint against the Bank alleged that on July 15, 1969, there was on deposit in the Bank the sum of $2598.33; that this sum was in a joint checking account and that both the plaintiff Ronald Doran and his wife Linda Doran were authorized to withdraw funds from the account. The complaint further alleged that at approximately 9:00 o'clock A.M., on July 15, 1969, the plaintiff Ronald Doran made oral demand upon the bank for delivery of the funds in the account but that this was refused. The ad damnum was in

the amount allegedly in the account at the time of the demand to-wit, the sum of $2598.33. In its Answer, the defendant Bank essentially admitted the allegations of the complaint but stated that the demand made by the plaintiff on July 15, 1969, was for a sum in excess of the funds on deposit in the account. The defendant Bank asserted as an affirmative defense the proposition that an oral demand was made for the sum of $2598.33 from said account by Linda Doran on July 15, 1969, by and through her agent, Harry Severns; that the demand by the plaintiff was made after the demand by Linda Doran and after payment had been made to her by means of a cashier's check.

It is necessary to summarize the pertinent evidence which bears on the issues raised by this appeal.

Lee M. Howerter, President of the defendant Bank, testified:

> I am acquainted with Ronald Doran and Linda Doran. They had established a joint checking account prior to July 15, 1969. Both Linda Doran and Ronald Doran signed the signature card. On July 15, 1969, they had on deposit the sum of $2598.33 when I arrived at the Bank. On the evening of July 14, 1969, sometime between 8:30 to 9:00 o'clock, I received a

call from Harry Severns. Mr. Severns asked that I charge the Dorans' account and draw the balance down to approximately $300 and give him a cashier's check for it. He stated that Linda would be in town the following day and as soon as she arrived, she would give me a check in the amount of the withdrawal. On the following morning on July 15th, I got to the Bank about 8 o'clock. The first thing I did was to check the balance in the account. I found it was $2898.33. I prepared a debit ticket, which is a charge against the account, in the amount of $2598.33, and caused a cashier's check to be issued to Mrs. Ronald Doran for that amount. I delivered this check to Mr. Severns in his office at the C.I.P.S. building at roughly 8:30 A.M. Previously, I had made a withdrawal slip and charged the account. At about 9:30 A.M., on July 15th, I first saw the plaintiff Ronald Doran. He came in after I had charged the account and delivered the cashier's check to Mr. Severns. I saw Doran in my office shortly after 9:30 A.M. He wanted to know what the balance in his account was. I told him it was $300.00. At some point in the conversation, I told him that a large withdrawal

had been made. When Ronald Doran made the request for the funds it was about an hour or more after the account had been charged. I made a personal call to the drive-in Bank to tell them that if Mr. Doran came in his account balance was $300 and I also notified our head teller at the Bank. I did this because I was the one who had initiated the transaction. Mr. Doran came into the Bank after we opened at 9:30 A.M.

Plaintiff Ronald Doran testified:

I am the former husband of Linda Doran. On July 14, 1969, I came home and my wife and children were gone. I talked that evening to my father-in-law, Harry Severns, who told me I was being sued for divorce. He told me he had not heard from my wife and didn't know where they were. This was approximately 7:30 or quarter to 8 P.M. On July 15th, the following day, I went to the drive-up facility of the Mercantile Bank because this opens a half hour earlier than the main Bank downtown. I inquired what my current balance was and they told me it was $300. I left the drive-up Bank and went downtown to the main Bank and waited for it to open. While I was waiting I saw Harry Severns and told

him that it appeared that someone had drawn a considerable sum from my joint checking account and he said he knew nothing about it. He said he didn't know where my children were. This was approximately ten minutes after 9. When the Bank opened I inquired about the balance in my account and he said the balance was $300. I went to Howerter's office and he said that my balance was $300. He told me that a large check had cleared the account before the Bank opened this morning. Then he told me that there was no check but that Harry Severns had called him and said there was a family problem and to take the money out of the account and make a cashier's check payable to Linda Doran. I told Howerter that I wanted the entire amount of my funds, not just $300. Howerter told me he had personally delivered the check to Harry Severns. I have never received the $2598.33. I had intended to withdraw all of the funds.

Linda Doran (Grizzle) testified:

I was divorced from Ronald Doran in October, 1969. I left the marital home on July 14th of that

year. On that date, I tried to reach Mr. Howerter at the Bank by phone but couldn't reach him. I called my father (i.e., Harry Severns), asked him to call Howerter and tell him to leave a balance of $300 in the account and authorized my father to make the request to Mr. Howerter to withdraw all but $300 from the account. Funds were withdrawn in the amount of $2598.33 and the money was paid to me in a cashier's check. I came to Quincy on July 15th and the Bank received my check. On July 14, 1969, I called my father sometime between 6:30 and 8:30 P.M. It could have been 7:00 o'clock; it could have been - I don't know whether it could have been 7:30. I tried to reach Mr. Howerter at his home but I couldn't, so I asked my father if he would do it for me. I asked him to have a check or whatever it was to get the money out for me and I would given them a check when I got to Quincy. I came to Quincy the next day about 12:30 or 1:00 o'clock and wrote my check to the Bank. The check was delivered to the Bank by Dorus Wear. Mr. Wear also delivered the check to me which I assumed he got from my father.

Harry A. Severns testified:

On July 14, 1969, I received one or more phone calls from my daughter, Linda. She asked me to call Howerter because she hadn't been able to get in touch with him and wanted me to ask him if she could withdraw this money and that is exactly what I did. She requested me to contact Howerter and arrange for the withdrawal of money from the joint account that she and Ronald had at the Bank. I telephoned Howerter on the evening of July 14th. The next morning Howerter came to my office and at about 8:30 A.M., delivered the cashier's check. I gave it to Linda that evening. On the evening of July 14, I received a call from Linda sometime between 6:00 P.M., and 7:00 o'clock P.M. I tried to get Howerter at the time but couldn't. I tried again and reached Howerter around 8:30 or 9:00 o'clock P.M., that evening at his home. He brought the check to my office the next morning at about 8:30 A.M.

The appellant states that there are only two issues presented by this appeal. (1) Was Severns the agent of Linda Doran; and (2) Was Severns' oral demand to Howerter for withdrawal of the funds made, in point of time, prior to the

oral demand of the plaintiff Ronald Doran? If the answer to both questions is affirmative the judgment must be affirmed; if the answer to either question is negative the judgment notwithstanding the verdict must be reversed.

We emphasize that the authority of the defendant Bank to pay funds from a checking account on the oral request of a joint depositor or his agent is not an issue before us. The question was raised by the Court during oral argument, and appellant expressly declined the issue, and thus conceded the authority of the Bank to issue the cashier's check in question, on oral demand, provided Severns was the agent of Linda Doran, and his demand, on her behalf, was prior in point of time to that of the plaintiff Ronald Doran.

The testimony of Severns was competent to establish the agency in question, as was the testimony of Linda Doran. The fact of agency was not only traced to acts and words of Linda Doran, through the testimony of Severns, but substantiated by Linda Doran. (Digman v Johnson 18 Ill.2d 424, 427, 164 N.E.2d 34.) Plaintiff argues that there are "conflicts" in the testimony of Howerter, Severns and Linda Doran. Insofar as their testimony relates to the essential fact that Linda Doran called her father during the evening of July 14th and requested him to contact Howerter and request the issuance of

the cashier's check, the "conflicts" reflect uncertainties as to the precise time the telephone calls were made from Linda Doran to Severns and from Severns to Hoverter. All three testified positively to the fact of the phone calls being had on the evening of July 14th. The testimony of these three witnesses stands uncontradicted by any evidence in the record. The issuance of the cashier's check and the debiting of the account prior to the oral demand of the plaintiff is, similiarly, uncontradicted by any evidence in the record, and is supported by circumstantial evidence.

Judgments N.O.V. are to be entered in those cases in which all of the evidence, when viewed in its aspect most favorably to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. (Pedrick v Peoria and Eastern R.R. Co. 37 Ill.2d 494, 510, 229 N.E.2d 543.) In considering the record before us, as it pertains to the only two issues presented by this appeal, we hold that the trial judge correctly applied the rule.

Judgment affirmed.

Craven, P.J., and Trapp, J. concur.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 25th day of July A. D. 1973, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12016 Agenda 73-159

People of the State of Illinois, Plaintiff-Appellee, vs. Todd Woods, Defendant-Appellant.	Appeal from Circuit Court Sangamon County

---

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

The Illinois Defender Project as appointed counsel for the defendant in the captioned case has filed a brief in accordance with the requirements of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, together with a motion to withdraw as counsel for the defendant-appellant. Leave was given the defendant-appellant to file additional points and authority and none were filed. Counsel asserts that there is no justiciable issue for review and that any request for review would be frivolous.

The defendant was charged with burglary and attempted theft out of an incident August 4, 1971, and with armed robbery allegedly occurring on October 26, 1971. Thereafter, pursuant to

plea negotiations, the defendant entered a plea of guilty to burglary and attempted theft and to a reduced charge of robbery. After full and complete admonishment, the court denied probation and sentenced the defendant to 2 to 10 years for burglary and 2 to 10 years for robbery with the sentences to run concurrently. In the brief accompanying the motion to withdraw, counsel examined in detail the admonitions and procedure followed in this case for compliance with the requirements of Supreme Court Rule 402 and the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. The court proceedings, upon the acceptance of the plea, are found to be in compliance with the requirements. Our independent examination of this record persuades us that there was thorough and complete compliance and that the defendant was fully admonished as to his rights and that after such admonition, he tendered a plea of guilty and the same was accepted. The judgment of convictions and the sentences imposed thereon are affirmed. Motion to withdraw as counsel for defendant-appellant is allowed.

AFFIRMED.

TRAPP, SIMKINS, J.J., concur.

13 I.A.3 68

124540—4M—9-70, 160-

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 25th day of July A. D. 1973, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12175 Agenda 73-155

People of the State of Illinois, Plaintiff-Appellee, vs. William E. McGuire and David J. Dudman, Defendants-Appellants.	Appeal from Circuit Court Menard County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

The defendant, William E. McGuire, appeals from judgments entered upon his pleas of guilty to burglary and theft and concurrent sentences of 4 to 6 years imposed upon such judgments. He asserts that the trial court was in error when judgments of conviction were entered upon both theft and burglary when both offenses arose out of the same transaction and were not independently motivated.

The facts in this case establish that both offenses related to the burglary of and theft from an office building in Greenview, Illinois. Upon these facts the judgment entered upon the charge of burglary - the more serious offense - is the only judgment that should have been entered. We specifically so held in

People v. Street, Ill.App.3d , 296 N.E.2d 606. See also People v. Stewart, 45 Ill.2d 310, 259 N.E.2d 24.

The defendant Dudman entered pleas of guilty to two separate offenses of burglary. While the offenses were on the same date, each was separate and unrelated. They did not arise out of the same transaction.

Each defendant asserts that he is entitled to the sentencing provisions of the new Code of Corrections. We agree. The Code is applicable to cases pending upon direct appeal. (People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) Under the Code, burglary is now a Class 2 felony. (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 19.1.) The sentence provided in the event of an imprisonment is an indeterminate sentence with a statutory minimum of 1 and a maximum of 20 years. The minimum sentence imposed may not be greater than one-third of the maximum. Further, the minimum is not to exceed 1 year unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term. (See Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-8-1(c)(3).) The defendant Dudman in a supplemental pro se brief asserts an additional issue to the effect that the plea of guilty was not preceded by the admonishments necessary under the requirements of Rule 402. This issue was not asserted by counsel and we find substantial compliance with the requirements of that Rule.

The judgment of conviction of theft as to the defendant McGuire is reversed; otherwise, the judgments are affirmed. The sentences imposed are vacated and the cause is remanded to the circuit court of Menard County for resentencing pursuant to the provisions of the Code of Corrections and the issuance of corrected mittimus.

AFFIRMED IN PART, REVERSED IN PART; SENTENCES VACATED AND CAUSE REMANDED WITH DIRECTIONS.

SMITH, SIMKINS, JJ., concur.

13 I.A.3 136

56604

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
Plaintiff-Appellee,	)	
vs.	)	
CARL LAMBERT,	)	HONORABLE JOHN GROMLEY,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Carl Lambert, hereafter called defendant, was charged with contributing to the sexual delinquency of a child in violation of section 11-5 of the Criminal Code. Ill. Rev. Stat. 1971, ch. 38, par. 11-5. After a bench trial, he was found guilty and sentenced to a term of six months in the House of Correction. On appeal, defendant argues that he was not proved guilty beyond a reasonable doubt and that the trial court committed reversible error in sentencing after having been informed that defendant had been given a "sitting out period" on a previous offense.

At trial, the following evidence was adduced. Audrey Rogers testified that she is the mother of Gwendolyn Rogers, aged 16 years. Gwendolyn testified that on May 6, 1971, at approximately 11:00 P.M., she was on her way to the store with a friend when the defendant, accompanied by two friends, approached her. He produced a pistol, put it to her head, and said he was going to take her to the projects at 2450 West Monroe Street. Once at that building the defendant took her to the sixth floor laundry room, leaving the others on the first floor. There the defendant again put the pistol to her head and forced her to perform an act of oral copulation. The people who had remained on the first floor came up to the

sixth floor laundry room and started knocking on the door. The defendant then forced her out of the room and down the stairs. As they were walking down Campbell Street, a fight broke out between the defendant and one of his friends, and Gwendolyn was able to get away at that time. She immediately went to the building and informed the guards of what had occurred, and they then called the police.

The defendant testified that on May 6, 1971, at approximately 11:00 P.M., he saw Gwendolyn Rogers at Madison and Campbell Streets. He was with a friend named Larry Wilson. Gwendolyn asked him if he wanted a date, and he responded by asking her if she wanted a headache, stating that this meant a punch in the head. As he continued down the street, the girl walked behind him, cursing him. He denied ever taking her up to the laundry room or putting a gun to her head. He was arrested approximately 20 to 25 minutes after the incident.

The defendant first argues that he was not proved guilty beyond a reasonable doubt because the uncorroborated, inconsistent testimony of Gwendolyn Rogers was insufficient to sustain the charge of contributing to the sexual delinquency of a child. Defendant bases this argument upon alleged inconsistencies between Gwendolyn Rogers' direct and cross-examination. We have carefully examined the record and conclude that the alleged inconsistencies constitute nothing more than an explanation on cross-examination in more detail of the witness' testimony on direct examination. The fact that a witness on cross-examination, when asked specific, detailed questions, may explain in further detail the testimony adduced on direct testimony examination, does not establish a contradiction in the witness' testimony.

A charge of contributing to the sexual delinquency of a child, as in any sex offense, must be examined with utmost caution and circumspection because the accusation is easily made, hard to prove, and harder to defend against. People v. Pointer, 6 Ill. App. 3d 113, 285 N.E. 2d 171. In a bench trial, it is the duty of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony. A reviewing court will not disturb the trial court's judgment in this regard unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt. People v. Catlett, 48 Ill. 2d 56, 286 N.E. 2d 378; People v. Pointer, 6 Ill. App. 3d 113, 285 N.E. 2d 171. In the case before us, the trial judge chose to believe the testimony of Gwendolyn Rogers, rather than that of the defendant. We cannot say that this determination was erroneous. We conclude that there was adequate evidence upon which the trial judge could rely to establish the defendant's guilt beyond a reasonable doubt.

The defendant's second contention is that error was committed when, during the hearing in aggravation and mitigation, the trial court was informed by the Assistant State's Attorney that on a previous offense the defendant had been given a "sitting out period." At a pre-sentence hearing, the trial court is presumed to recognize any incompetent evidence and to disregard it. People v. Williams, 9 Ill. App. 3d 401, 292 N.E. 2d 437; People v. Bey, 51 Ill. 2d 262, 281 N. E. 2d 638. In the instant case, there is nothing in the record which would overcome this presumption. Defendant's sentence of six months in the House of Correction is well within the statutory limits and, considering the facts of this case and the defendant's prior record, the sentence is not unreasonable.

For the foregoing reasons, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

THIRD DIVISION

Justice McNamara did not participate.

June 29/73

NO. 56018

MARY B. SAUERLAND, Appellant,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
vs.	)	
KEITH A. SAUERLAND, Appellee.	)	HONORABLE EDWARD E. PLUNDRAK, PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

This was a post-decree proceeding in a divorce case. Appellee Keith A. Sauerland, the divorce defendant, filed a petition to compel appellant Mary B. Sauerland, the divorce plaintiff, to execute and deliver to him a $5,000 note and trust deed in accordance with the terms of the divorce decree. Appellant answered the petition, admitted the terms of the decree, but denied that she was obliged to deliver the note and trust deed. In a counter-petition, appellant referred to an incorporated provision of the decree that required appellee to hold her harmless from any debt which she co-signed with him during their marriage. Then, appellant alleged that appellee was indebted to her in the sum of $5,979.61, an indebtedness caused principally by the payment of $4,000 which appellant alleged she made on an instalment note co-signed by her, appellee, and her father, William F. Boekhoff. After hearing the parties, the trial court found that appellant did not pay the $4,000; it was paid by her father. The court found, however, that appellee was indebted to appellant in the sum of $466.50. Therefore, subject to a deduction of this amount, appellant was ordered to execute and deliver to appellee a note for $5,000 and trust deed. The issue in this appeal is whether the record supports the trial court's finding and order.

It is an elementary rule that the burden of proving

payment is on him who asserts it. Schanzenbach v. Brown, 58 Ill. App. 526; Garrett v. Pigford (1953), 218 Miss. 840, 67 So. 2d 885, 887; 9 Wigmore Evidence §2517 (3d ed., 1972 Supp.); 60 Am. Jur. 2d, Payment, §141. In this case, appellant defended the claim for the $5,000 note with the assertion that she made a payment of $4,000 on an obligation against which appellee had the duty to hold her harmless. The only evidence to support appellant's assertion was a check dated November 7, 1969, made by her father, William F. Boekhoff, and payable to her for $4,000. The check was contemporaneously endorsed to the lawyers for Thomas F. O'Connor, the obligee on the instalment note who at that time had a judgment for $4,302.50 against appellee, appellant, and Boekhoff. The trial court found, and we think correctly, that the $4,000 check, although payable to appellant, was not her money; it was money which Boekhoff paid to satisfy a judgment that bound him jointly and severally with appellee and appellant. As the trial court concluded, appellee's obligation to Boekhoff had to be settled in some other proceeding.

The record supports the trial court's finding. Therefore, since the payment asserted was not proven, it was proper for the trial court to order compliance with the divorce decree by having appellant execute and deliver to appellee the $5,000 note and trust deed. The order is affirmed.

Affirmed.

Schwartz, J. and Hayes, J., Concur.

Publish abstract only.

No. 58364

M. E. STEIN & COMPANY, INC., Petitioner-Appellant, vs. ELOISE JONES, a/k/a ELOISE WILLIAMS, Respondent-Appellee.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HONORABLE JOSEPH SCHNEIDER, PRESIDING.

PER CURIAM* (Fifth Division, First District):

This is an appeal from an order of the circuit court of Cook County denying the petition of tax-purchaser appellant M. E. Stein & Company for the issuance of a tax deed pursuant to Section 253(a) and 266 of the Revenue Act. (Ill. Rev. Stat. 1967, ch. 120, pars. 716(a) and 747.) The order appealed from was entered following a remandment from the First District in M. E. Stein & Company, Inc. v. Jones (1971), 133 Ill.App.2d 561, 273 N.E.2d 199. In that case the reviewing court found that the judgment was ambiguous and remanded with directions that the trial judge "deny appellant's application for a tax deed if it finds that appellee made a bona fide attempt to redeem prior to the expiration of the redemption period, and to grant the application if it finds she did not."

The facts are clearly set forth in the opinion of the remanded case and need not be repeated here.

Petitioner contends in this appeal that, because the respondent had been impeached on material issues, her entire testimony must be disregarded since it lacked independent corroboration and therefore the judgment of the trial court is against the manifest weight of the evidence. We do not agree.

Petitioner points out contradictions and discrepancies between the testimony of respondent and of witnesses for the petitioner. The determination of the trial judge should not be set aside because he believes the respondent and rejects the testimony of the other witnesses. John Allan Co. v. Harvey (1971), 131 Ill.App.2d 626, 267 N.E.2d 533.

---

* MR. JUSTICE ENGLISH did not participate

In a trial before the court without a jury it is elementary that the credibility of witnesses and the weight to be accorded the testimony are to be determined by the trier of fact, and unless manifestly against the weight of the evidence, his findings will not be disturbed. (In Re Application of County Collector (1972), 7 Ill.App. 3d 124, 128, 287 N.E.2d 81, 84.) Furthermore, it has been stated that if the trial court's resolution of the factual disputes finds support in the evidence, its resolution is not contrary to the manifest weight of the evidence. Kurz v. Quincy Post No.37, American Legion (1972), 5 Ill.App.3d 412, 416, 283 N.E.2d 8, 11.

In the case at bar, there is positive and uncontradicted evidence that the respondent went to the Redemption Department in the office of the County Clerk's office on July 1, 1968, to redeem the delinquent taxes when the last day of redemption fell on Sunday, June 30, 1968 and that a clerk in the Redemption Department of the County Clerk's office told the respondent that she could not redeem such taxes on July 1, 1968 because the last day for redemption was June 30, 1968. There is also testimony that respondent again went to the Redemption Department on July 10th or 11th, 1968 and told Harry Lux, a clerk in the Redemption Department, that a clerk would not permit her to redeem the taxes on July 1, 1968 because the period of redemption expired on June 30, 1968. Frank Basilio, a witness for the petitioner, is in charge of the Redemption Department of the County Clerk's office. He testified that the procedure in that office which was known by all the employees was that if the expiration date falls on a Sunday there is one more day to redeem. There was no specific denial of respondent's testimony.

In light of the foregoing testimony, the judgment of the trial court denying the petitioner's application for a tax deed is not manifestly against the weight of the evidence.

The judgment of the trial court is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY]

13 I.A.3 198

No. 56827

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
v.	)	HONORABLE
	)	PHILIP ROMITI,
BEN E. BROWDER,	)	PRESIDING.
	)	
Defendant-Appellant.	)	

MR. JUSTICE HALLETT delivered the opinion of the court:

After a jury trial on charges of armed robbery and rape, the defendant was found not guilty of armed robbery but guilty of rape, and was sentenced to four to fifteen years in the state penitentiary.

On his appeal the defendant contends, first, that his initial arrest without a warrant was illegal and that therefore his identification in a lineup, his alleged oral admissions following such identification and his in-court identification should have been suppressed as the poisoned fruits of that arrest and, second, that the prosecutor's comments, in his closing argument, on the failure of the defendant to produce witnesses in support of his alibi prejudiced him and deprived him of a fair trial.

Johnnie Mae Johnson testified that on January 30, 1971, at about 5:45 P.M., she was returning home from a local store when she saw a young man walking through an adjoining alley. She continued on beyond the alley and, after turning the corner, noticed the same man walking behind her. She continued walking and, when she got a door from her home, he grabbed her and forced her to go through a gangway and into a basement where he raped her. He also took her watch, some bus tokens and some change. He had a white bandage on his hand and wore a white tam and an earring in his left ear. She also observed his face and heard his voice, warning her not to call the police. She went directly home and immediately called the police. She was taken to the County Hospital where she was examined. The intern's report showed sperm in the vaginal area.

The next day the defendant and three other men were arrested, without a warrant, at his home in connection with an investigation of the rape of one Sharon Alexander and placed in a lineup. After Miss Alexander had identified the defendant and had left the room, the complaining witness here, Miss Johnson, also viewed the same lineup. She positively identified the defendant by his face and his voice. He also wore an earring in his left ear, had a bandage on his hand and had a white tam. The defendant then told Officer Conroy that he wanted to tell him something. After the officer had warned him of his right to remain silent and his right to counsel, the defendant told Conroy and Officer O'Driscoll that he had raped Johnnie Mae Johnson but denied having a gun and denied raping Sharon Alexander. He also repeated his admission before Officer Thomas, a homicide investigator.

The defendant testified, in his own behalf, that he had left his home at about 5 o'clock on the evening of the crime to go to the store, that he was back home by 5:30 P.M. and that at 5:45 P.M., he was at home with his brother, his mother, his brother's girlfriend, one of his brother's partners and one of his partners. He denied raping or robbing Johnnie Mae Johnson and denied telling any police officer that he had raped her.

During the closing argument, the Assistant State's Attorney, after stating that the defendant is presumed innocent and that the burden of proof is on the State, which must prove his guilt beyond a reasonable doubt, mentioned the defendant's failure to produce as witnesses any of those persons in whose presence he claimed to have been at the time of the crime.

The jury found the defendant guilty of rape but not guilty of armed robbery.

In the written motion for a new trial, the defendant did not claim that his oral admissions should have been excluded or that the court erred in allowing the identification testimony but did claim that the State's Attorney's closing argument was inflammatory and prejudicial. On the oral argument of the motion, the defendant also argued that the identification testimony

was tainted by a suggestive lineup.

The motion for a new trial was denied, the defendant was sentenced to not less than four nor more than fifteen years in the penitentiary and this appeal followed.

Going now to the defendant's first contention - that his initial arrest without a warrant (in connection with another alleged rape) was illegal and that therefore his identification in the resulting lineup, his alleged oral admissions following his said identification and his later in-court identification should all have been suppressed as the poisoned fruits of that arrest - this contention was not raised in the trial court, either during the trial or in the motion or argument for a new trial.

In People v. Harris, 33 Ill. 2d 389, 211 N.E. 2d 693, the defendant, in the Supreme Court, for the first time contended that evidence used against him was the result of an illegal arrest and an unlawful search and seizure. In affirming, our Supreme Court, at pages 390-391, said:

> "At the trial defendant urged a lack of proper identification of the defendant and claimed that he found the wallet on a C.T.A. bus. On this appeal, however, his sole argument is that the wallet in question was obtained by an illegal search and seizure pursuant to an illegal arrest. Despite the inadequate abstract filed, we have carefully examined the entire record and find that neither the defendant nor his counsel had at any time moved to suppress the evidence in question. We also find a complete lack of any objection to the admission of this evidence on the ground that it was illegally obtained or on any other specific ground.
>
> "Defendant's post-trial motions for a new trial and in arrest of judgment are also devoid of any reference to the impropriety of the admission of this evidence. On this appeal much of defendant's argument is devoted to the alleged illegality of his arrest. This issue becomes important only if the evidence obtained thereby is properly objected to at the trial. It is well settled that this court will not consider the question of illegal search and seizure, even though pursuant to an illegal arrest, where it has not been raised

before the trial court. (People v. Sotos, 26 Ill. 2d 460; People v. King, 26 Ill. 2d 586; People v. Brengettsy, 25 Ill. 2d 228.) Justice will not be served by permitting a defendant to proceed through an entire trial without raising alleged error and then take advantage of such error on an appeal from an adverse judgment."

In People v. Moore, 43 Ill. 2d 102, 251 N.E. 2d 181, the Court, at page 106, said:

"***In that brief the defendant contends that his arrest was illegal and argues that the seizure of his articles was illegal. The defendant was represented at his trial by counsel and the alleged irregularity of the arrest and search was not presented to the trial court. Constitutional claims may, of course, be waived and the failure to assert this claim in the trial court makes it unnecessary to consider it here."

Again, in People v. Nilsson, 44 Ill. 2d 244, 255 N.E. 2d 432, the Court, at pages 246-247, said:

"Defendant next contends that the circumstances attending his arrest, his confession, and his consent to the search which produced the stolen goods were such as to require suppression of the confession and the recovered property. Defendant was arrested without a warrant and claims here for the first time that there was no probable cause for the arrest. Therefore, he argues, evidence adduced thereby was inadmissible as 'fruit of the poison tree.' Since this argument was not raised in his motion to suppress or at any time prior to this appeal, we find that the issue was waived. (People v. Moore, 43 Ill. 2d 102, 106.)"

And, more recently, in People v. Burroughs, 10 Ill. App. 3rd 477, 294 N.E. 2d 325, this court, at page 478, said:

"Defendant contends that the search and seizure of three tires and rims from the trunk without a warrant was illegal and they cannot be used to support a conviction of a theft of property of the value of over $150.00. Further, that the only proper evidence would be the one tire and rim in the back seat of the car. Since the value of this property would be less than $150.00, the offense would be reduced from a felony to a misdemeanor.

"Defendant was represented by private counsel in the trial court and failed to move in that court for suppression of the three tires and rims. He urges that this question should be considered for the first time on review in this court, by reason of Supreme Court Rule 615, as a plain error or defect affecting substantial rights of the defendant although not brought

> to the attention of the trial court. We cannot agree. Under the facts of this case we feel bound by the rule that a reviewing court will not consider the question of illegal search and seizure where it has not been raised in the trial court. People v. Harris, 33 Ill. 2d 389, 211 N.E. 2d 693; People v. Cassell, 101 Ill. App. 2d 279, 243 N.E. 2d 363; People v. Green, 36 Ill. 2d 349, 223 N.E. 2d 101; People v. Washington, 45 Ill. 2d 477, 259 N.E. 2d 276; People v. Moore, 43 Ill. 2d 102, 251 N.E. 2d 181; People v. Adams, 41 Ill. 2d 98, 242 N.E. 2d 167."

We therefore conclude that since the propriety of his arrest (in another rape investigation) was not in any way raised in the trial court, it cannot now be raised here on appeal. We also doubt seriously that his identification in the lineup, his oral confessions after that identification and his positive in-court identification can be considered as the "fruits" of that arrest.

This brings us to the defendant's second contention - that the prosecutor's comments, in his closing argument, on the failure of the defendant to produce as witnesses any of those persons in whose presence he claimed to have been at the time of the crime prejudiced him and deprived him of a fair trial.

In his closing argument, the Assistant State's Attorney, after stating that the defendant is presumed innocent and that the burden of proof is on the State, which must prove his guilt beyond a reasonable doubt, mentioned the defendant's failure to produce as witnesses any of those persons (viz: his mother, his brother Tyrone, Tyrone's girlfriend, his brother's partner, Stanley Polk, and the defendant's partner, Milton Hale) in whose presence he claimed to have been at the time of the crime. The defendant gave these names at the end of his testimony, so that the State had no opportunity to call them as witnesses. Furthermore, the proof left no doubt whatsoever of his guilt. The victim had adequate opportunity, during the crime, to observe him and to hear his voice, she identified him positively by his

appearance and voice and, as she had described the rapist, he had a pierced left ear with an earring, had a bandage on his hand and wore a tam.

In such a situation, the case of People v. Nilsson, 44 Ill. 2d 244, 255 N.E. 2d 432, above cited, is persuasive. There our Supreme Court, at page 248, speaking through Mr. Chief Justice Underwood, said:

> "The final point raised by defendant concerns the prosecutor's reference, during closing argument, to defendant's failure to support his alibi with the testimony of the alleged alibi witnesses. The authority in Illinois is conflicting on the question whether such comment is improper. (See People v. Rubin, 366 Ill. 195, 198; People v. DeLordo, 350 Ill. 148, 161-62; People v. Munday, 280 Ill. 32; People v. Smith, 74 Ill. App. 2d 458, 463-64; but see, People v. Swift, 319 Ill. 359, 365-66; People v. Smith, 105 Ill. App. 2d 8, 11-12; People v. Sanford, 100 Ill. App. 2d 101, 104-05.) There can be no question, however, as to the rule that improper remarks do not constitute reversible error unless they result in substantial prejudice to the accused. (People v. Stahl, 26 Ill. 2d 403, 406; People v. Swets, 24 Ill. 2d 418, 423; People v. Berry, 18 Ill. 2d 453, 458.) Since we are of the opinion that the prosecutor's remarks here were so minor that they could not have been a material factor in defendant's conviction, and therefore cannot constitute reversible error, we need not consider their propriety."

We therefore conclude that the prosecutor's remarks during his closing argument did not constitute reversible error in that they did not substantially prejudice the accused or deprive him of a fair trial.

We therefore affirm the judgment of the circuit court.

JUDGMENT AFFIRMED.

Burke, P.J., concurs.

Goldberg, J., specially concurring.

(Abstract only.)

Mr. JUSTICE GOLDBERG, specially concurring:

I approve of the result reached and of the reasons stated in the above opinion. It demonstrates completely and effectively that the judgment appealed from should be affirmed. However, I wish to add the following as additional reasons requiring this result.

This record shows that defendant was quite ably represented in the trial court. His appointed counsel made motions for discovery; to suppress oral statements made by defendant; to reduce bail and to suppress evidence of his identification. These factors should impel us to presume a knowing waiver of any issue regarding legality of defendant's arrest.

In this regard, I would cite People v. Montgomery, 51 Ill.2d 198, 282 N.E.2d 138. There, the Supreme Court invoked the doctrine of waiver despite the youth of the defendant. (Defendant there was 17 years of age. Defendant in the case at bar was 18 when tried.) We note particularly that the Supreme Court described the arrest without warrant in Montgomery as harmless error, "***in the absence of a search and seizure issue, and in view of adequate Miranda warnings***." (51 Ill.2d at 202.) Furthermore, it has been held that where no evidence was seized at the time of defendant's arrest, any issue that may have arisen from a warrantless arrest "***was rendered moot when the defendant was indicted by the grand jury." People v. Hyde, 1 Ill.App. 3d 831, 845, 275 N.E.2d 239.

As regards defendant's second point regarding improper final argument by the prosecutor, the background is shown in the above opinion. The record here shows, in addition, that defendant's testimony on direct examination consisted of no more

than nine answers to that number of questions put by his counsel. He did little more than deny categorically that he had raped and robbed the complaining witness and that he had admitted the rape to the police officers. Under these circumstances, the State was obliged to cross-examine defendant. Without such procedure the defendant would have had a completely unfair privilege and advantage. Throughout the entire cross-examination, which sought to ascertain where defendant was at the time of the commission of the crime and with whom, no objection was made by his diligent trial counsel. This cross-examination of defendant was entirely proper. (See People v. Burris, 49 Ill.2d 98, 104, 273 N.E.2d 605.) Therefore, it is clear that the jury knew very well, without comment by the prosecutor, that defendant's position was totally uncorroborated.

In a situation of this type, the comments by the prosecutor in final argument are patently lacking in significance. Furthermore, the evidence of guilt here is beyond reasonable doubt and virtually overwhelming. There is a strong and positive identification of defendant; a clear-cut oral admission of guilt by him, corroborated by three police officers, made after complete Miranda warnings; and, finally, medical evidence substantiating the testimony of the complaining witness. The only scintilla of evidence to the contrary is defendant's own categorical denial. In this situation, the allegedly improper remarks by the State's Attorney were, "***of such a minor character that prejudice to defendant is not their probable result***." People v. Clark, 52 Ill.2d 374, 390, 288 N.E.2d 363.

In addition, it may be stated here, beyond a reasonable doubt, that the error complained of did not contribute to the

verdict and the same verdict would have been returned in its absence. (People v. Trice, 127 Ill.App.2d 310, 319, 262 N.E. 2d 276.) Under these circumstances, irrelevant and improperly suggestive testimony (People v. Scott, 52 Ill. 432, 441, 442, 288 N.E.2d 478) and even error of constitutional dimension should be deemed harmless. People v. Brown, 51 Ill.2d 271, 273, 281 N.E.2d 682. See also People v. Lucas, 48 Ill.2d 158, 162, 163, 269 N.E.2d 285.

On oral argument, defendant cited People v. Moore, 9 Ill. App.3d 231, 292 N.E.2d 42. In that case, the second division of this court reversed a conviction where no objection was made to prejudicial closing argument in which the State's Attorney referred to the failure of defendant to support his alibi testimony, all elicited by cross-examination, by calling other witnesses. We note, however, that the court reached this result after examination of "the entire record" and it qualified the result reached by stating specifically that it was based "on the evidence in this case." (See 9 Ill.App.3d at 232, 233.) Quite to the contrary, in the case at bar, an examination of the entire record here impels to the conclusion that the assailed final argument was not prejudicial and that the judgment appealed from should be affirmed.

Defendant urges that the final argument of the prosecutor may have misled the jury as regards the burden of proof. Not only did the prosecutor himself avoid this possible result, as shown by the above opinion, but the instructions of the court regarding burden of proof and presumption of innocence (State's Instruction No. 6, IPI-Criminal No. 2.03) and burden of proof on the issues in rape (State's Instruction No. 10, IPI-Criminal No. 9.03) were certainly sufficient to guide the jury properly in this regard.

In this portion of the argument, defendant relies primarily on People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432. That case is inapplicable here. As pointed out by the Supreme Court, the prosecutor there manifestly prejudiced the defendant by repeated assertions regarding the burden of defendant to introduce evidence to create a reasonable doubt of guilt. The court also pointed out other improper argument by the prosecutor. Furthermore, the prosecution in the Weinstein case was based upon circumstantial evidence.

Nor can defendant avail himself of his argument of inconsistency because the jury found him not guilty of robbery. Illinois adheres to the rule that logical consistency in verdicts is not necessary provided that the verdicts are not legally inconsistent. See People v. Hairston, 46 Ill.2d 348, 361, 362, 263 N.E.2d 840. Note also People v. Lamb, 10 Ill. App.3d 935, _____N.E.2d_____where the same argument was rejected where a jury found defendant not guilty of burglary but guilty of theft.

56899

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County,
vs.	)	
SAMUEL HILL, JR., Defendant-Appellant.	)	Honorable Archibald J. Carey, Judge Presiding.

PER CURIAM*

Samuel Hill, Jr. (petitioner) appeals from the trial court's dismissal of his petition under the Illinois Post-Conviction Hearing Act. The public defender of Cook County was appointed as petitioner's counsel on appeal and has filed a motion for leave to withdraw as appellate counsel, supported by a brief filed pursuant to Anders v. California, 386 U.S. 738, contending that the appeal is frivolous and without merit. Copies of the motion and brief were sent to the petitioner and he was allowed additional time to file any points that he desired in support of the appeal; petitioner has not responded.

On December 13, 1966, a jury returned a verdict finding the petitioner guilty of the June 11, 1966, murder of Willie Brown. He was subsequently sentenced to serve not less than 15 or more than 20 years. The conviction was affirmed on appeal. People v. Hill (1968), 97 Ill.App.2d 385, 240 N.E.2d 373, leave to appeal denied. The incident occurred following an alleged theft of money from the petitioner by the decedent. A Miss Dolores Brown testified that she saw the defendant walk over to the deceased, who was playing with a baby, and ask for his money back; she then heard a shot and saw the baby falling from the deceased arms. Miss Brown saw the defendant shoot the deceased. Miss Phyllis Bryant testified that she saw the defendant shoot the deceased after a conversation about money and that deceased was holding a baby at the time. Defendant did not testify, but his sister and three other witnesses did.

Petitioner's post-conviction petition complained about the testimony of Phyllis Bryant and Dolores Brown and about the failure of his court-appointed attorney to call certain witnesses, who, he alleged, were present and ready to testify on his behalf. The State filed a motion to dismiss on the grounds that the allegations failed to raise any constitutional question, were bare allegations, insufficient to require a hearing, and that the doctrine of res judicata applied, attaching as an exhibit the opinion of the appellate court. At a hearing on the petition, petitioner submitted the affidavit of Robert Hill, his brother, which stated that the trial lawyer told him his testimony would not be needed, that he would have testified that deceased had a broken bottle in his hand and was arguing with petitioner about money the deceased had taken from the petitioner. An affidavit of James Clark was also submitted, stating that he was prepared to testify but was not called, that he (and not the deceased) was holding the baby and that he was standing next to the deceased, who had a broken bottle in his hand and was arguing with the petitioner. The State submitted the affidavit of John J. Crown, defendant's trial attorney, who stated that Hill and Clark were interviewed but not called as a matter of trial strategy; that when he interviewed them, neither advised him they had seen the deceased attacking defendant with a broken bottle; that he had advised his client of his determination that it would not be in his client's best interests to call either Hill of Clark as witnesses and that the petitioner concurred in that judgment.

We agree with the appellate counsel that petitioner's claim with respect to Phyllis Bryant was decided in the direct appeal and that the direct appeal is therefore res judicata of that claim. People v. Ashley (1966), 34 Ill.2d 402, 216 N.E.2d 126. We also agree that petitioner's objection to the testimony of Dolores Brown was waived because not presented to the court on the direct appeal. People v. Agnello (1967), 35 Ill.2d 611, 613-614, 221 N.E.2d 658.

The public defender also points out that the court's consideration of the three affidavits was proper and sufficient to satisfy the requirements of due process under the ruling in People v. Smith (1970), 45 Ill.2d 91, 94, 256 N.E.2d 800, where the court affirmed the dismissal of a post-conviction petition which had alleged that trial counsel was incompetent in failing to call a known and available alibi witness (defendant's stepson). The court there stated (45 Ill.2d 91 at 94):

> "While it would not have been improper for the post-conviction judge to have required oral testimony at the hearing upon defendant's amended petition, we cannot say that such action was essential. The governing statute (Ill.Rev.Stat. 1967, ch. 38, par. 122-6) specifically provides that the court 'may receive proof by affidavits.' The affidavits of the investigating officer and defendant's trial counsel clearly establish that the reason trial counsel did not call the stepson, and opposed the State's request for a continuance to enable it to do so, was not the result of any incompetence on the part of counsel."

Our review of the case discloses that the trial court did not err in dismissing defendant's petition. Our independent review of the record, in pursuance of our duties under the Anders decision, reveals no additional possible grounds for appeal, and we have concluded that the appeal is frivolous and without merit. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel for defendant on appeal, and the judgment dismissing the petition is affirmed.

MOTION ALLOWED; JUDGMENT AFFIRMED.

FIRST DISTRICT, SECOND DIVISION
*DOWNING, J., did not participate.

(PUBLISH ABSTRACT ONLY)

58136

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.	)	
	)	
JOHN D. LIGHTING,	)	HONORABLE
	)	JOSEPH A. POWER,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM* (SECOND DIVISION, FIRST DISTRICT):

John D. Lighting, hereafter called petitioner, appeals from an order dismissing his amended post-conviction petition, filed pursuant to the Post Conviction Hearing Act (Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq), without an evidentiary hearing. In his amended post-conviction petition and in this court, petitioner argues that he was incompetent to stand trial and that the trial court erred in failing to hold a competency hearing immediately prior to trial on the court's own motion.

On January 13, 1965, after a bench trial, petitioner was convicted of murder. He was sentenced to a term of 15 to 25 years in the Illinois State Penitentiary. He appealed and on May 9, 1967, we affirmed his conviction. People v. Lighting (1967), 83 Ill. App.2d 430, 228 N.E.2d 104. On September 18, 1969, petitioner filed a pro se post-conviction petition. An attorney was appointed to represent him and on March 5, 1970, an amended post-conviction petition was filed.

The amended post-conviction petition alleged that the petitioner was at the time of trial incompetent, based on the following facts: After petitioner was indicted for murder, reports of two psychiatrists showed that he was not able to cooperate with counsel. On January 5, 1961, petitioner was found incompetent to stand trial and was transferred to the Illinois State Security Hospital. On June 8, 1962, a behavior clinic examination was

returned and the diagnosis of Dr. William Haines was that petitioner was competent to stand trial. On October 24, 1962, after a jury trial, petitioner was found competent to stand trial. On February 24, 1964, petitioner's counsel requested an examination by two independent psychiatrists. The record is silent as to the results of those examinations. A report by Dr. Gerson Kaplan, dated August 31, 1964, made at petitioner's request, found him competent to stand trial. The amended post-conviction petition was dismissed without an evidentiary hearing, upon motion of the State.

A proceeding under the Post Conviction Hearing Act is a new proceeding for the purpose of inquiring into constitutional phases of the original conviction which have not already been adjudicated. People v. Beckham (1970), 46 Ill.2d 569, 264 N.E. 2d 149. Where an allegation has once been considered and rejected by this court, any reconsideration of the same allegation in a post-conviction proceeding is barred by the doctrine of res judicata. People v. Bracey (1972), 8 Ill.App.3d 119, 289 N.E.2d 241. The concept of res judicata also includes all claims which were known from the original trial record and could have been presented on direct review, those claims being considered waived. People v. Adams (1972), 52 Ill.2d 224, 287 N.E.2d 695; People v. Lyons (1972), 8 Ill.App.3d 825, 291 N.E.2d 353. This rule will be relaxed only where fundamental fairness requires it. People v. Mamolella (1969), 42 Ill.2d 69, 245 N.E.2d 485.

In the case at bar, petitioner argues that he was entitled to an evidentiary hearing on the allegation in his amended post-conviction petition that he was incompetent to stand trial. Petitioner's factual allegations to support this argument all result from the original trial record. In petitioner's direct appeal, he did not argue that he was incompetent to stand trial.

Petitioner's failure to raise that issue in his direct appeal does not allow him to raise it in a post-conviction petition.

Petitioner argues that fundamental fairness requires a relaxation of the doctrine of res judicata. An examination of the record in the case at bar reveals no fundamental unfairness, because, even if petitioner's argument were to be considered on the merits, a reversal would not be warranted. The critical question is whether a bona fide doubt existed as to the defendant's competency at the time of trial. This question rests largely within the discretion of the trial judge. People v. Southwood (1971), 49 Ill.2d 228, 274 N.E.2d 41. In the case at bar, petitioner was found competent to stand trial in 1962. At the time of his trial in 1965, the trial judge had a psychiatric report dated 4-1/2 months prior to trial and made at petitioner's request, which found him competent to stand trial. As pointed out during the hearing on the State's motion to dismiss, the petitioner testified at trial. There is nothing in the record which would indicate that a bona fide doubt existed as to petitioner's competency at the time of trial. Under all of these circumstances, the trial court was not required on its own motion to hold another competency hearing prior to petitioner's trial. Petitioner's situation, therefore, is not such as to raise it to the status of a "special circumstance" which would require a relaxation of the doctrine of res judicata.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

* LEIGHTON, J., did not participate.

58315

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.	)	
	)	
LARRY WHITE,	)	HONORABLE
	)	CHESTER J. STRZALKA,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM* (SECOND DIVISION, FIRST DISTRICT):

Larry White was convicted, following a bench trial, of Criminal Trespass to Vehicle and sentenced to a term of six months at the Illinois State Farm at Vandalia, Illinois. Ill. Rev. Stat. 1971, ch. 38, par. 21-2. On appeal, he raises the following contentions: (1) the complaint was defective in that it did not allege that the vehicle was the property "of another"; (2) a variance in the first name of the complainant, as it appeared in the complaint and as adduced at trial, is a fatal variance; (3) the State did not "demonstrate" that a proper Miranda warning was given to the defendant; (4) he was not proven guilty beyond a reasonable doubt. Since we conclude that the evidence did not prove defendant guilty beyond a reasonable doubt, it is not necessary to consider the other contentions.

The evidence established that a 1963 Chevrolet, belonging to complainant, Lawrence White (who, however, had signed the complaint using the name Columbus White), was found abandoned by Chicago police officer Grant on June 4, 1972. In the course of an investigation, the officer spoke to defendant about 6:00 P.M. that evening and advised him of his constitutional rights. The defendant said he had obtained the vehicle from Gregory Vaughn (a co-defendant) the night before and admitted that he was in the vehicle that day and had left the vehicle "a couple of hours before". Chicago police investigator Frank Cosgrove also testified

that he saw defendant at approximately 8:00 P.M. on the evening of June 4, 1972, and defendant admitted having been in the car.

Defendant testified at trial, but only concerning the Miranda issues, and neither admitted nor denied having been in the car. Gregory Vaughn, a co-defendant, testified, but denied that he told the officers he had ever been in the car. The evidence, if believed by the trial court, showed only that defendant had been in the car on June 4, 1972, six days after it had been stolen. It does not show that defendant had knowledge that the car was stolen or that defendant had any reason to believe either that the car was stolen or that Vaughn did not have lawful possession. There was no evidence that the vehicle's condition or appearance was such (ignition missing, evidence of forcible entry, etc.) that a reasonable person would realize it was a stolen vehicle. Nor were there any other circumstances from which the trial court could have inferred either that defendant knew the car was stolen or that Vaughn did not have lawful possession. The State has not shown beyond a reasonable doubt that defendant knew he was "entering a vehicle without the owner's consent". People v. Owes (1972), 5 Ill.App.3d 936, 284 N.E.2d 465.

Accordingly, the judgment of the circuit court of Cook County is reversed.

JUDGMENT REVERSED.

* STAMOS, P.J., did not participate.

56467

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	
LUCIOUS GREGG (Impleaded), Defendant-Appellant.	)	Honorable Robert J.Collins, Presiding.

PER CURIAM:

Lucious Gregg was indicted with Roger Lee Blakely on two counts of armed robbery, in violation of section 18-2 of the Criminal Code. Ill.Rev.Stat., 1969, ch. 38, para. 18-2. He was found guilty by a jury as charged in the indictment and was sentenced to two concurrent terms of 8 years to 16 years in the penitentiary. He appeals. (Co-indictee Blakely was also indicted on a narcotics possession charge, entered pleas of guilty to all three charges in the two indictments, and was placed on probation for concurrent periods of 5 years on each plea, on condition that he serve one year in the County Jail; Blakely is not involved in this appeal.)

The sole issue raised on this appeal is whether the sentences imposed upon Gregg are excessive and should be reduced. The defendant contends that the trial court imposed the lengthy sentences upon him as punishment for his having elected to avail himself of his right to a trial by jury, whereas his co-indictee entered pleas of guilty; and that the trial court took improper matters into consideration in arriving at the terms imposed. It

is unnecessary to deal with these contentions since this court believes that the sentences imposed are excessive in light of defendant's record and history.

On September 28, 1970, Gregg and Blakely held up two attendants at a gasoline filling station in Chicago. Gregg carried a handgun and announced the holdup, and Blakely actively participated in the robbery. Both of the victims had known the defendant and his companion prior to the incident, and it was defendant's position at trial that one of the victims implicated him in the robbery as revenge for an earlier altercation between him and that victim.

The record reveals that the defendant had no criminal convictions prior to the instant conviction. He was 20 years of age at the time of the offenses, was supporting a new-born baby and was addicted to heroin, which habit he subsequently overcame. The minimum term provided by the statute under which he was found guilty was 2 years, whereas he was sentenced to concurrent minimum terms of 8 years and to maximum terms of 16 years for the two offenses committed simultaneously. (Ill.Rev.Stat., 1969, ch. 38, para. 18-2; see also Ill.Rev.Stat., 1971, ch. 38, para. 18-2).

While the mere fact that there is a disparity between the terms of the defendant's sentences and those of his co-indictee will not constitute grounds for reduction thereof (People v. Thompson, 36 Ill.2d 478, 482, 224 N.E.2d 264), the length of the

terms imposed upon the defendant together with the circumstances involved are not conducive to the liklihood of his rehabilitation and warrant the exercise of our power to reduce the punishment imposed. People v. Williams, 3 Ill.App.3d 1, 279 N.E.2d 100; Ill.Rev.Stat., 1971, ch. 110A, para. 615.

The defendant's sentences are accordingly reduced to two concurrent terms of not less than 3 years nor more than 12 years, and as modified, the judgments of the Circuit Court of Cook County are affirmed.

Judgments affirmed as modified.

Third Division: Judge Schwartz did not participate.

57264

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
Plaintiff-Appellee,	)	
vs.	)	
ARTHUR HODGES,	)	HONORABLE JAMES M. BAILEY, Presiding.
Defendant-Appellant.	)	

PER CURIAM:

On May 13, 1971, the defendant, on his plea of guilty in the Circuit Court of Cook County, was convicted of the crime of armed robbery. Ill. Rev. Stat. 1969, ch. 38, par. 1802. He was sentenced to a term of eight to twelve years in the Illinois State Penitentiary. On appeal, defendant argues

1) that the trial court erred when it failed to grant his motion to dismiss for want of prosecution for failure to bring him to trial within 120 days of his incarceration;

2) that the trial court erred when it denied his request to be physically present at a pretrial conference; and

3) that his sentence of eight to twelve years is excessive and should be reduced to a term of four to twelve years.

Defendant first argues that the trial court erred when it failed to grant his motion to dismiss the indictment for want of prosecution under the four-term act in that he had been held in custody for more than 120 days prior to trial. Ill. Rev. Stat. 1969, ch. 38, par. 103-5. On May 8, 1971, five days prior to his plea of guilty, defendant made a motion for discharge under the four-term act, which was denied. The provisions of section 103-5 of the Criminal Code

are not jurisdictional. People v. Utterback, 385 Ill. 239, 52 N. E. 2d 775; People v. Swansey, 7 Ill. App. 3d 1042, 288 N. E. 2d 646. A voluntary plea of guilty waives the right to a speedy trial under this section. People v. Decola, 15 Ill. 2d 527, 155 N. E. 2d 622; People v. Lybarger, 22 Ill. 2d 170, 174 N. E. 2d 687. In the instant case, defendant's voluntary plea of guilty, entered after his motion to dismiss was denied, constituted a waiver of his right to discharge under the four-term act.

Defendant's second argument is that the trial court committed reversible error when it denied his request to be present at a pretrial conference. On May 13, 1971, defendant requested a conference with the court. The trial judge explained the details of a pretrial conference, and the defendant then asked if he could be present. The trial judge indicated that the defense attorney would be present, but the defendant would not, because the judge feared defendant might make an admission which could later be used against him. The defendant then stated that he understood what the judge had said, but he still wished the court to hold a conference. After the pretrial conference, when the defendant was informed of the results, he voluntarily entered a plea of guilty and received the sentence he had agreed to accept.

A defendant does not have a right to a pretrial conference with the trial judge. In the case before us, the defendant voluntarily asked for a pretrial conference. When he was informed that he would not be present, but his attorney would, the defendant repeated his request that the trial judge hold a pretrial conference. When defendant was fully informed of the results, he entered a plea of guilty,

and received the sentence agreed to at the pretrial conference. Under these cirumstances, the defendant was denied none of his constitutional rights.

Defendant's final contention is that his minimum sentence is excessive and should be reduced to a term of four years. The State agrees, in its brief, that defendant's minimum sentence should be reduced to four years. We therefore deem it appropriate that defendant's minimum sentence be reduced to a term of four years.

Accordingly, defendant's minimum sentence is reduced to a term of four years, and the judgment of the Circuit Court is affirmed as modified.

Judgment affirmed as modified.

THIRD DIVISION

Justice McNamara did not participate.

No. 57393

THE COUNTY OF COOK, a body politic, etc.,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
vs.	)	
LLOYD A. FRY ROOFING COMPANY,	)	HONORABLE HERBERT C. PASCHEN, PRESIDING.
Defendant-Appellant.	)	

MR. JUSTICE McGLOON delivered the opinion of the court:

Defendant, Fry Roofing Company, a corporation, was found in contempt of an agreed order of the circuit court of Cook County, chancery division. This is an appeal from the judgment order of that court imposing a fine of $10,000 on defendant. The judgment order was the result of the previous contempt order which imposed a $200 per day fine on defendant until it purged itself of contempt. The $10,000 judgment was on account, a credit toward the total amount of the fine which was due and owing under the contempt order.

Defendant urges three grounds for reversal: 1) It contends that its conduct did not constitute contempt. 2) It contends that it was denied due process because it did not receive notice and a hearing on the issue of contempt. 3) It contends that it was entitled to but denied the right to trial by jury on the issue of contempt.

We reverse.

The facts are as follows: Fry Roofing Company (hereinafter Fry) was an Illinois corporation which manufactured roofing paper and roofing shingles at its plant in Summit, Illinois. In February, 1971, the County of Cook filed a two count complaint charging Fry with air pollution based on nuisance and violation of the Cook County Air Pollution Control Ordinance. The complaint asked for preliminary and permanent injunctive relief which would enjoin defendant from operating its plant in such manner. In its answer, defendant denied the charges of air pollution and a hearing was set on the issue of whether a preliminary injunction should

issue. On May 6, 1971, the two parties entered into an agreed order, which specified, inter alia, the date of July 19, 1971, as the deadline for the installation of a pollution control system. The order also specified the dates of August 2, 1971, and August 18, 1971, as deadlines for testing and inspection of the installation. The order further provided that it was not to be construed as an admission by the defendant of any matter in issue nor was it to be construed as an admission by the plaintiff that its claims were without merit. The order further provided that the court retain jurisdiction to issue such orders as might be necessary to bring the system into compliance with the pollution ordinances.

On July 22, 1971, three days after the installation was to be completed, defendant filed a motion to extend the time of installation until September 30, 1971. On the same date, plaintiff filed a motion for injunction wherein it requested that the court enjoin the operation of the asphalt saturator at defendant's plant. Both motions were set for hearing on July 26, 1971.

At the hearing on the motions, representations of counsel and testimony of witnesses as to the extent of the completed installation and reasons for the delay were received. Paul B. McInerney, vice president of Fry, was the sole witness who testified for the defendant. The substance of his testimony was that on May 20, 1971, two weeks after the entry of the agreed order, Fry received a bid from Bacon Tank and Manufacturing Company (hereinafter Bacon) for the necessary work. The bid was accepted on June 19, 1971, one month later. The bid projected September 30, 1971, as the completion date for the installation. The purchase order which was signed by a Fry employee and which accepted the Bacon bid called for a September 30, 1971, completion date. Although it was possible that Fry could have known on May 20, 1971, that the installation would not be completed until September 30, 1971, McInerney explained that Fry did not move for an extension until July 22, 1971, because he did not notice the projected installation date on the bid and the purchase order. McInerney

further explained that this inadvertent mistake occurred because of his unfamiliarity with the environmental control program of Fry, which had been previously handled by an employee who had resigned shortly after the bid had been received.

Attached to Fry's motion for an extension was a letter from Bacon which stated that because of strike threats and demands of other customers, Bacon was having problems with the special fabrication of the pollution equipment intended for Fry, but that it still was aiming for a September 30, 1971, completion date. Also attached to the motion was a picture of a concrete slab which was purported to be the foundation for the equipment. McInerney testified that the concrete for the slab was poured on June 25, 1971, and the finishing of the concrete was completed on July 20, 1971. George Sterba, a chemical engineer with the Cook County Environmental Control Bureau, testified that he inspected the Fry plant on July 19, 1971, and the only sign of new construction or work in progress for pollution control he found was a concrete slab outside a building.

McInerney further testified that he supplied the dates which were used in the agreed order to Fry's counsel over the telephone. He explained that he underestimated the time necessary for the completion of the installation, and that because of this miscalculation, Fry was unable to meet the deadlines in the agreed order.

At the conclusion of the hearing, the trial court found Fry in contempt of the agreed order. The contempt finding was not the relief requested by the plaintiff in its motion for injunction. The court imposed the contempt finding as an alternative to shutting down Fry's plant completely, and putting people out of work. The order was couched in terms so as to be coercive in nature. Fry was fined $200 per day until it purged itself of contempt. The court did not enter a rule to show cause or any other similar preliminary order before it entered its contempt finding. Fry had no formal notice that it might be subject to a finding of contempt at

the conclusion of the hearing.

On August 19, 1971, Fry filed a motion to vacate the contempt order. This motion and the motion for injunction were continued from time to time. The court received periodic reports concerning the progress of the installation of the equipment over the next several months. At a hearing on January 31, 1972, counsel for defendant told the court that the pollution control equipment had finally been installed. By affidavit, the court was informed that the cost of the equipment installed exceeded $150,000. At a hearing on February 1, 1972, the court instructed the parties that arguments on plaintiff's motion to reduce the contempt finding to final judgment would be heard on February 28, 1972. On that date, the court entered its judgment order, and this appeal followed.

Defendant's first contention is that its conduct did not constitute contempt and that the court erred in so finding. Defendant does not dispute the power of the court to punish a violation of an agreed order by a contempt finding. (Pfeiffenberger v. Illinois Terminal Railroad Co. (1946), 329 Ill.App. 476, 69 N.E.2d 355.) It argues that punishment for contempt is a drastic remedy which requires proof of wilful disobedience before it is properly imposed. It explains its miscalculations of the completion dates in the agreed order, its delay in accepting Bacon's bid, and its failure to request an extension until after the deadline for installation as inadvertent mistakes which, while admittedly frustrating to the objectives of the agreed order, were not wilful or intended to violate the order. Plaintiff argues that Fry's conduct went beyond mistake or inadvertence. It characterized Fry's conduct as a pattern of delay which showed an apparent lack of diligence and a total lack of concern for the court's order.

In general, contempts are classified as either civil or criminal depending on the punishment involved. (Board of Jr. College v. Cook County T. Union (1970), 126 Ill.App.2d 418, 262 N.E.2d 125.) If the punishment is imprisonment for a definite term or a fine for a certain sum of money, the contempt is said

to be criminal. If the punishment is commitment of a contumacious party until he complies with the mandate of the court or a fine until there is obedience to the court's order, the contempt is said to be civil. (People v. Redlich (1949), 402 Ill. 270, 83 N.E.2d 736; Board of Jr. College v. Cook County T. Union (1970), 126 Ill. App.2d 418, 262 N.E.2d 125.) Although the difference between the two types of contempt may in some instances be difficult to perceive, People v. Gholson (1952), 412 Ill. 294, 106 N.E.2d 333, in the instant case, we find the contempt to be civil contempt. The contempt finding of the trial court was intended to coerce the defendant into compliance with the agreed order. Fry was to pay a certain sum of money each working day until it installed the anti-pollution equipment.

Before one may be punished for civil contempt, the court must find a wilful refusal to comply with the order of the court. (Powers v. People (1904), 114 Ill.App. 323.) Fry argues that there are valid excuses to explain its inability to meet the deadline. Plaintiff responds that this inability to perform was the result of Fry's own fraudulent and improper conduct and that Fry intentionally placed itself in a position in which compliance would be impossible. In Adams v. Rakowski (1943), 319 Ill.App. 556, 49 N.E. 2d 733, the court said:

> The general rule seems to be that in proceedings to punish one as for civil contempt for failure to carry out the directions of a decree to pay money or deliver up property, proof that the disobedience to the decree has not been wilful but was due solely to the pecuniary inability or other misfortune of the accused, not resulting from his fraudulent conduct to produce that condition, will purge him of the contempt (cases omitted). Adams v. Rakowski (1943), 319 Ill.App. 556, 560, 49 N.E.2d 733, 735.

At the hearing at which defendant was found in contempt, we find that Fry carried its burden of establishing its inability to comply with the agreed order. (Dishinger v. Bon Air Catering (1949), 336 Ill.App. 557, 84 N.E.2d 562.) We also find that there was insufficient evidence to prove that the conduct of Fry was wilful in the sense that it fraudulently placed itself in a position

where it could not comply with the agreed order. While we do not condone the seeming inefficiency on the part of Fry which is revealed throughout the record, based on the evidence presented at the hearing, we conclude that the trial court abused its discretion in finding Fry in contempt of court. Janov v. Janov (1965), 60 Ill. App.2d 11, 207 N.E.2d 691.

Defendant's second contention is that it was denied due process because it did not receive notice, pleadings, and a hearing on the question of contempt. The plaintiff argues that this contention should not be considered on appeal because it was not raised in the trial court and was not properly preserved for review. In the alternative, the plaintiff argues that because Fry allegedly admitted it was in contempt at the hearing of July 26, 1971, it may be punished in a summary manner without the formality of pleading, notice or hearing. Plaintiff further argues that the numerous hearings which were held after the contempt order was entered afforded the defendant its right of due process.

Because we have decided that the trial court erred in finding defendant in contempt, we find it unnecessary to decide the due process issue or the issue of whether Fry was entitled to but denied the right to a jury trial on the issue of contempt.

For the above reasons the judgment order of the circuit court of Cook County is reversed.

Judgment reversed.

Schwartz and McNamara, JJ., concur.

No. 58470

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
MATHEWS LUIS,	)	HONORABLE
	)	CHESTER J. STRZALKA,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Defendant, Mathews Luis, was charged with criminal trespass to vehicle. (Ill.Rev.Stat. 1971, ch.38, par.21-2.) He was found guilty in a bench trial and placed on probation for one year. He appeals on the ground that he was not proved guilty beyond a reasonable doubt.

Defendant was charged with having "committed the offense of criminal trespass to vehicle in that he knowingly and without authority entered a motor vehicle, 1966 Chevrolet VIN 155696J120524, the property of CASTILLO Rafael without the said consent of said owner" [sic]. It was stipulated that the complaining witness, Rafael Castillo, is the "owner of the car," and he testified through an interpreter that he never gave anybody permission to use that car.

Investigator Bruce, of Area 5 auto theft, testified: On August 5, 1972, he arrested the defendant at his home. He had occasion to go to the defendant's home because the police had received a notification from the Secretary of State that a car registered in the name of Louis Matthews* had been reported stolen by the complainant. With this information, the police went to the defendant's home and asked him if he still owned the car. Defendant said that he had sold it. The police asked him where the car was and he told them. They subsequently recovered the automobile and the title. At that time the title was in the defendant's name. The witness identified People's Exhibit 1 for identification as a title to a 1966 Chevrolet containing the VIN number belonging to the complaining witness and registered in the name of Louis Matthews, dated May, 1972.

---

* The defendant's name is Louis Matthews. The complaint, however, listed his surname first.

The witness further testified that defendant told them that he had bought the car from an unknown Puerto Rican who was going back to Puerto Rico. The defendant did not know the gentleman's name or address or where they could locate him.

Defendant Louis Matthews testified: On or about May 8, 1972, he bought a 1966 Chevrolet. He, his father and brother went out looking for a car. They went to a car lot in the 1700 block of North Western Avenue. A man came out, a dealer, and said, "You want to buy a car?" Defendant said, "We're looking for car." The man showed them this car, which was parked on the street. At first he wanted $500 for it. They were all speaking Spanish. They walked away and the man called them back. They (defendant, his father and brother) kept going lower and lower until defendant could afford it; he had $150 and the man took that. The man told defendant he owned the car and finally agreed to take $150 because he had to leave that night for Puerto Rico. He took the title out of his back pocket, signed it, gave defendant the keys and took the license plates off. The title said the man's name was Rafael Castillo. The defendant compared the signature on the front and back of the title; to him they were the same. The defendant did not ask the man for any other identification. The man signed the title right there; then the defendant went to the currency exchange without the man and they notarized it. Defendant did not get a bill of sale.

Defendant's father, Louis Matthews, Sr., testified: He was with the defendant and his other son Gilbert at a used car lot in the 1700 block of North Western Avenue. He talked to the man who sold the car to his son (defendant) and made a deal with him. The father put in $100 and defendant the rest, all in cash.

If it could be inferred that the defendant did enter the vehicle, that in and of itself is not sufficient to sustain the conviction because the evidence is uncontradicted that defendant did not know the car was stolen until the police so advised him a month after he had sold the car. An innocent entry into a vehicle

not knowing it was stolen is no offense. People v. Owes, 5 Ill.App. 3d 936, 284 N.E.2d 465.

Defendant was not proved guilty beyond a reasonable doubt.

Judgment reversed.

Third Division. Mr. Justice Schwartz did not participate.

No. 57337

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
	)	
vs.	)	_____
	)	
STANLEY LUCAS,	)	HONORABLE
	)	JOHN J. MORAN
Defendant-Appellant.	)	PRESIDING

PER CURIAM* (First District, Fifth Division):

After a bench trial defendant was found guilty and fined $150 for the offense of gambling, in violation of section 28-1(a)(2) of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 28-1(a)(2).) On appeal he contends that the trial court committed reversible error in denying his motion to suppress evidence and that he was not proven guilty beyond a reasonable doubt. (Defendant filed no motion for a new trial.)

The arresting officer testified on the motion to suppress that he was in an automobile in the area of 1514 West Ogden Avenue on a gambling investigation when he observed defendant, a known bookie, enter a telephone booth about 25 or 30 feet away. The officer saw him speaking on the telephone for about ten minutes, during part of which he read from a slip of paper. When defendant left the booth, the officer announced his office and called the defendant over to the automobile; he noticed that the defendant then dropped the slip of paper to the ground in a crumpled condition and he saw that defendant had a scratch sheet protruding from his pocket. He retrieved the slip of paper, which was lying on the ground away from any other debris, and he observed that the slip of paper contained notations of horse betting. The defendant was then placed under arrest. The officer further testified that he neither observed what was written on the slip of paper nor did he overhear any of the defendant's telephone conversation, at the time defendant was inside the booth.

---

* Lorenz, J., took no part.

Defendant testified at the hearing on the motion to suppress that the officer was parked in a public parking lot about 20 or 30 feet from the telephone booth, that after defendant left the booth, he was told by the officer to get into the automobile, and that the officer then went to the front of the vehicle where he found a piece of paper. Defendant testified that he was never at the front of that vehicle and that he did not throw anything to the ground at any time after leaving the telephone booth. The officer testified in rebuttal that he did observe the defendant throw the slip of paper to the ground. The motion to suppress was denied.

It was stipulated between the parties that the evidence taken at the motion to suppress could be considered at trial and, in addition, the arresting officer also testified at trial that he was familiar with the records of horse bets. He further stated that there was nothing illegal about possessing a scratch sheet; that he saw no money exchange hands; that he saw the slip of paper fall from defendant's hand, but did not see it hit the ground; and that that slip of paper in question was the only piece of paper in the area.

It should be noted that the criminal complaint originally charged the defendant with having been the keeper of bets in violation of section 28-1(a)(5) of the Criminal Code. After the denial of the motion to suppress, the Assistant State's Attorney asked leave to amend the complaint by striking the reference to section 28-1(a)(5) and substituting therefor section 28-1(a)(2), which charged defendant with gambling by making a wager of contest. Defense counsel specifically stated he had no objection to the amendment and also waived any defects in substance or form. Although the complaint was physically amended in that regard, through an apparent oversight the name of the offense "keeper of bets," was not stricken therefrom and the judgment order states

that defendant "is guilty of the criminal offense of VIOLATION OF CHAPTER 38 SECTION 1A2 (KEEPER OF BETS) on said finding of guilty." The state contends and we agree that defendant was not prejudiced by this stenographical error and that he in fact knew the offense he was charged with and of which he was found guilty. We note that in his notice of appeal and in his brief, he recites that he was found guilty of "making a wager in violation of Chapter 38-1a2 (sic)."

With regard to defendant's first contention -- that the trial court committed error in denying his motion to suppress the use of the slip of paper containing notations of horse betting, we note that the arresting officer testified he observed the defendant, a known bookie, enter a telephone booth, place a call and read into the telephone from a small slip of paper and saw defendant drop the slip of paper when confronted by the officer after he left the phone booth. The officer also observed a scratch sheet protruding from defendant's pocket and when he retrieved the slip of paper, he recognized it as bearing notations of horse bets. It is clear that the officer made no arrest prior to observing what was written on the paper which was discarded by defendant and in open view of the officer. The officer thereafter had reasonable grounds to effect defendant's arrest. People v. Bridges (1970), 123 Ill. App.2d 58, 259 N.E.2d 626.

The cases cited by defendant in support of his position are not in point. In People v. Mirbelle (1934), 276 Ill.App. 533, the police heard someone holler, "Hold up," on the street, and they thereafter came upon the scene and called to defendant to raise his hands, which motion revealed a weapon partially concealed in his belt; it was held that under those circumstances the officers had no probable cause to arrest the defendant and that therefore the charge of carrying a concealed weapon could not stand. In People v. Roebuck (1962), 25 Ill.2d 108, 183 N.E.2d 166, an

unlawful arrest resulted in defendant exposing the contraband for which he was later charged; the reviewing court held that evidence obtained by the search after the unlawful arrest should have been suppressed. In Rios v. United States (1960), 364 U.S. 253, 4 L.Ed.2d 1688, 80 S.Ct. 1431, the Supreme Court remanded the cause to determine the legality of the local officers' arrest of the defendant there, since the evidence was conflicting as to whether the defendant voluntarily exposed the contraband prior to arrest or whether it was exposed because of an arrest which, if made under those circumstances testified to by police officers, appeared to have been without reasonable cause. And in People v. Martin (1970), 124 Ill.App.2d 70, 260 N.E.2d 364, the defendant was placed under arrest before he was searched and the betting slips discovered.

As to the question of whether defendant was proven guilty beyond a reasonable doubt of the offense of wagering, the facts as set forth above lead to the inference that while defendant was on the telephone, he placed a bet on a horse race. The officer observed him read into the telephone from a slip of paper which it was later learned, contained notations of horse bets. The logical conclusion from those facts is that defendant placed a bet while in the telephone booth, although the officer could not hear what was said over the telephone. In a bench trial, the facts, and the inference therefrom, are to be determined by the trial court and we believe that the evidence underlying his determination in this case is not so unsatisfactory or implausible that we should find that a reasonable doubt existed as to defendant's guilt. People v. Wiggins (1957), 12 Ill.2d 418, 147 N.E.2d 80; People v. Diesel (1970), 128 Ill.App.2d 388, 262 N.E.2d 15.

The case of People v. Perry (1966), 34 Ill.2d 229, 215 N.E.2d 229, cited by defendant, is in no manner analogous

to the instant factual situation. And in citing People v. Mamolella (1967), 85 Ill.App.2d 240, 229 N.E.2d 320 (affirmed on appeal), defendant apparently contends that the receiving of telephone calls at a place of gambling by officers making a raid is a pre-requisite to a finding of guilty; the case does not so hold.

In view of our conclusion (thereof), it will not be necessary to consider the state's contention that defendant failed to properly preserve his points for review.

For the reasons stated, the judgment of the circuit court is affirmed and the cause is remanded with directions to correct the wording of the judgment as indicated herein.

AFFIRMED AND
REMANDED WITH DIRECTIONS.

(Publish abstract only)

No. 57824

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. DWIGHT COLEMAN, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HONORABLE ROBERT J. COLLINS, PRESIDING.

PER CURIAM* (Fifth Division, First District):

Defendant, Dwight Coleman, appeals from an order of revocation of probation and sentencing to a term of one to three years entered after a hearing on a rule to show cause.

On January 12, 1972, defendant 21 years old, entered a plea of guilty to the offense of unlawful possession of a narcotic drug (less than 30 grams of heroin) and was placed on probation for a period of five years. Subsequently, on May 29, 1972, a hearing was held pursuant to a rule to show cause why defendant's probation should not be revoked because he had been convicted of unlawful possession of a narcotic drug on March 30, 1972 and sentencedto six months. His probation was revoked and he was sentenced to one to three years.

The Illinois Defender Project appointed to represent defendant on appeal has filed a motion in this court for leave to withdraw as appellate counsel. The motion supported by a brief pursuant to the requirement of Anders v. California (1967), 386 U.S. 738, states that the only possible arguments which could be raised on appeal are (1) the sufficiency of the defendant's original plea of guilty, entered January 12, 1972; (2) the conduct of the hearings on the rule to show cause why defendant's probation should not be revoked; (3) that defendant's subsequent conviction, which was the basis for revocation of his probation, was erroneous; and (4) that his sentence is excessive. The brief concluded that an appeal on these issues is without merit and frivolous. Defendant was mailed copies of the petition and brief on April 3, 1973 and was informed that he had until May 31, 1973, to file any additional points he

---

* MR. JUSTICE ENGLISH did not participate.

might choose in support of his appeal. He has not responded.

The first possible argument which could be made on appeal is that defendant's plea of guilty, entered January 12, 1972, is invalid. The report of proceedings shows that the defendant was properly admonished before his plea of guilty was accepted. Moreover, the defendant did not appeal from this conviction and the order of probation. Where there has been no appeal from the judgment of guilty and the order of probation, such cannot be reviewed upon an appeal from an order revoking the probation. (People v. Nordstrom (1967),37 Ill.2d 270, 226 N.E.2d 19.) In Nordstrom the court dismissed an appeal seeking a review of the original conviction and the revocation of probation where the notice of appeal was not filed until after the revocation of probation. The court said at page 273:

> Defendant, under the then applicable rules and statutes, had a right to appeal his final judgment of guilty within 30 days of the ruling on his petition for probation. Since he failed to avail himself of this right, the appellate court refused to consider errors alleged to have occurred in his original trial.

See also, People v. Elliott (1971), 131 Ill.App.2d 969, 269 N.E.2d 323.

The second possible argument which could be made on appeal is that the defendant was denied due process of law at the hearing on the rule to show cause why his probation should not be revoked. The procedural requirements which must be followed at a hearing on a rule to show cause were set out by this court in People v. Morales (1971), 2 Ill.App.3d 358, 359-360, 276 N.E.2d 391, 392:

> The procedure must establish that the defendant has been given notice and a copy of the charge, that he has had an opportunity to be heard and that a conscientious judicial determination has been made in accord with procedural methods which include the right to counsel and a reasonable time to prepare a defense. People v. Walker, 122 Ill.App.2d 461, 259 N.E.2d 304.

See also, People v. Stovall (No. 58276, decided April 25, 1973). A review of the record in the case at bar indicates that the above procedure was followed. Defendant was given notice and a copy of the charge.

He appeared at the hearing represented by counsel. At the May 29, 1972 hearing, defense counsel stipulated that the defendant had in fact been on March 30, 1972, convicted of unlawful possession on February 20, 1972 of a narcotic drug. Defendant was permitted to testify. Proof of the defendant's violation of probation was clearly established by the stipulation that the defendant was in fact the same person who had been convicted on March 30, 1972 of unlawful possession of a narcotic drug. People v. Ward (1972), 4 Ill.App.3d 631, 281 N.E.2d 703.

The third possible argument which could be made on appeal is that defendant's subsequent conviction was erroneous. At the hearing on the rule to show cause, defendant stated that he was appealing his subsequent conviction. The Illinois Defender Project's motion to withdraw states that a check of the court files shows that no appeal was ever perfected in that case. The termination of defendant's probation, based upon his March 30, 1972 conviction, was proper. (People v. Williams (1970), 130 Ill.App.2d 192, 264 N.E.2d 589.) Since the defendant did not appeal his March 30, 1972 conviction, there is no basis upon which that conviction can be reviewed in these proceedings.

The last possible argument which could be made on appeal is that defendant's sentence is excessive and should be reduced. While this court has the authority to reduce a defendant's sentence, that authority should be exercised with care and only when it appears that the sentence imposed by the trial court constitutes a gross departure from the normal sentence for similar offenses. (People v. Taylor (1965), 33 Ill.2d 417, 211 N.E.2d 673.) In the case at bar, the defendant was initially given five years probation on the offense of unlawful possession of a narcotic drug. Within two months, the defendant had been arrested and convicted of the same offense again. Defendant's sentence is within the statutory limits prescribed for this offense, and considering the facts of this case, the sentence is not excessive or unreasonable.

The Unified Code of Corrections does not necessitate a reduction in the defendant's sentence. Under the Unified Code of Corrections,

unlawful possession of heroin, in an amount under 30 grams, is a Class III felony. (Ill. Rev. Stat. 1973-74, supp., ch. 56 1/2, sec. 1402(b).) A Class III felony is punishable by imprisonment for a period of from one to ten years. (Ill. Rev. Stat. 1972, supp., ch. 38, sec. 1005-8-1(b) (4).) In the case at bar, the defendant's sentence complies with the Unified Code of Corrections.

After a full examination of all of the proceedings in accordance with the dictates of Anders, we concur in the opinion of the Illinois Defender Project that none of the points thus raised are arguable on their merits and that the appeal is wholly frivolous. Our examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

The motion of the Illinois Defendant Project to withdraw is allowed, and that the judgment of the circuit court of Cook County is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY.]

57627

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
v.	)	
	)	
PERCY TAYLOR,	)	HONORABLE
	)	CHESTER J. STRYZALKA,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE HALLETT delivered the opinion of the court:

Defendant was charged with attempted petit theft. After a bench trial, he was found guilty and sentenced to serve one year at the Illinois State Farm at Vandalia.

The only issue presented for review is whether defense counsel's statement, when the case was called for trial, that "This is a plea of not guilty, trial by this court, jury waived," demonstrates an understanding waiver by the defendant of his right to trial by jury. We conclude that it does and affirm.

The Illinois Criminal Code (Ill. Rev. Stat. 1971, ch. 38, sec. 103-6) provides that: "Every person accused of an offense shall have the right to trial by jury unless understandingly waived by defendant in open court."

Defendant's appeal cites said provision, plus two cases, People v. Baker, 126 Ill. App.2d 1, 262 N.E.2d 7, and People v. Boyd, 5 Ill. App.3rd 980, 284 N.E.2d 699, in each of which cases the Public Defender was appointed just as the case went to trial and, after a very brief hiatus, announced that defendant waived a jury and a bench trial followed. In each of those cases, this court reversed on the ground that the record did not affirmatively show that the defendant had "understandingly" waived his right to a jury trial. In Boyd, this court, at page 982, said:

> "In the case at bar, the Public Defender was appointed moments before the trial began. There was no recess in the proceedings for defendant to consult with his newly appointed counsel. The record does not affirmatively show that the defendant knew or was informed of his right to trial by jury, and therefore his jury waiver was not made knowingly and understandingly."

In the present proceeding, the following colloquy took place:

"THE CLERK: Robert Bailey, Percy Taylor.
THE COURT: Robert Bailey
MR. BAILEY: Right here.
THE COURT: Are you ready for trial?
MR. BAILEY: Yes, sir.
MS. BURKE: This is a plea of not guilty, trial by this court, jury waived.
THE COURT: As to both defendants?
MS. BURKE: Yes.
MR. MRIZEC: State is ready.
MS. BURKE: May I look at the file for a second.
MR. MRIZEC: State is ready. Ready, counsel?
MS. BURKE: Yes."

In our opinion, this does not demonstrate that counsel for the defendant Taylor (and his co-defendant) had just been appointed. Had that been the fact, the record would certainly have contained some mention of the appointment during said colloquy. The fact that she wanted to look at the file does not establish that she had not seen it before and her cross-examination of the complaining witness reflects her familiarity with the file and with the facts involved. We must, therefore, assume that the defendants and their counsel had discussed their right to a jury trial and had decided to waive it, prior to the time the case was called for trial.

It has long been established in Illinois that an accused speaks and acts through his attorney and where a defendant permits his attorney, in his presence, to waive a jury trial, he is deemed to have acquiesced in and is bound by that action. In People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397, our Supreme Court, at page 260, said:

> "Nor do we find merit to the further contention of defendant that the court failed in its duty to see that her waiver of a jury trial was understandingly and knowingly made. (People v. Surgeon, 15 Ill2d 236.) The record reveals that defendant's counsel, in her presence and without objection on her part, expressly advised the court that the plea was "not guilty" and that a jury was waived. An accused ordinarily speaks and acts through his attorney, who stands in the role of agent, and defendant, by permitting her attorney, in her presence and without objection, to waive her right to a jury

> trial is deemed to have acquiesced in, and to be bound by, his action. (See: People v. Novotny, 41 Ill.2d 401; People v. Melero, 99 Ill. App.2d 208; People v. King, 30 Ill. App.2d 264; Hensley v. United States (D.C. cir.), 281 F.2d 605; People ex rel. Derber v. Skaff, 22 Wis.2d 269, 125 N.W.2d 561.) ***."

See, also:

People v. Richardson,
32 Ill.2d 497, 500-501, 207 N.E.2d 453;
People v. Novotny,
41 Ill.2d 401, 408-409, 244 N.E.2d 182;
People v. Johnson,
121 Ill. App.2d 97, 257 N.E.2d 121;
People v. Suriwka,
2 Ill. App.3rd 384, 389, 276 N.E.2d 490;
People v. McClinton,
4 Ill. App3rd 253, 254-255, 280 N.E.2d 795;
People v. Gay,
4 Ill. App.3rd 652, 654-655, 281 N.E.2d 738.

It is also well established in Illinois that, in applying the foregoing principle, no distinction is made between private counsel and the Public Defender. In People v. Suriwka, 2 Ill. App.3rd 384, 276 N.E.2d 490, this court, at page 390, said:

> "*** There is no distinction made by the reviewing courts of this state between jury waivers by retained counsel and by court-appointed counsel insofar as they pertain to the responsibility of counsel or the effectiveness of the waiver. The Sailor rule is applicable to both."

See, also:

People v. McClinton,
4 Ill. App.3rd 253, 255, 280 N.E.2d 795;
People v. Gay,
4 Ill. App.3rd 652, 655, 281 N.E.2d 738.

Where, as here, the defendant has previously been tried and convicted of crime, the courts tend to take this into consideration in passing on whether the waiver was understandingly made. In People v. Gay, 4 Ill. App.3rd 652, 281 N.E. 2d 738, this court, at page 655, said:

> "***Furthermore, the statement of the defendant's background made at the hearing on aggravation and mitigation shows that '*** this defendant was no newcomer to criminal proceedings.' (People v. Richardson, 32 Ill.2d

> 497, 500, 207 N.E.2d 453.) This is quite an important factor in determining whether the jury waiver was understandingly made."

See, also:

People v. Richardson, 32 Ill.2d 497, 500, 207 N.E.2d 453.

We therefore conclude that trial by jury was "understandingly waived by defendant in open court" and affirm the judgment of the circuit court.

JUDGMENT AFFIRMED.

Burke, P.J., and Egan, J., concur.

ABSTRACT ONLY.

NO. 56317

PATRICIA KUJAK, Plaintiff-Appellee,	)	
vs.	)	
RODEMAR BECK, Defendant-Appellee,	)	APPEAL FROM
and	)	CIRCUIT COURT
MARIO DATO, Defendant-Appellant,	)	COOK COUNTY
and	)	
RODEMAR BECK, Cross-Plaintiff-Appellee,	)	HONORABLE FRANCIS X. CONNELL,
vs.	)	PRESIDING.
MARIO DATO, Cross-Defendant-Appellant.	)	

PER CURIAM*

The defendant, Mario Dato, appeals from a summary judgment for the plaintiff, Patricia Kujak, and the cross plaintiff, Rodemar Beck, on the ground that there was a genuine issue about a material fact which should have precluded the entry of summary judgment under section 57(3) of the Civil Practice Act. Ill. Rev. Stat. 1971, ch. 110, par. 57(3).

Plaintiff, Patricia Kujak, filed her complaint alleging that on February 9, 1968, she was a guest passenger in an automobile owned and operated by defendant, Rodemar Beck, at which time he was entering Grand Avenue from a parking lot, going north, and proceeded to make a left turn to go west when defendant, Beck, through willful and wanton negligence, caused a collision; Count II alleged that on the same date Mario Dato operated his motor vehicle, which was heading east on Grand Avenue, negligently, and struck the automobile in which she was a passenger. Beck answered and filed a cross-complaint against Dato, alleging that, while in the exercise of due care for his own safety, defendant Dato negligently caused the accident with the result that he suffered property damage. Defendant Dato filed general denials to the complaint and the cross-complaint.

On motion of the plaintiff Kujak and cross-plaintiff Beck, the court granted summary judgment for plaintiff and cross plaintiff against defendant Dato, finding that Dato was guilty of "the sole negligence" which caused the collision and that neither plaintiff nor cross plaintiff was guilty of any contributory negligence; the court also entered summary judgment for defendant Beck against plaintiff Kujak on her complaint against him (she has not appealed), set the matter for trial on the issue of damages, and found no just reason to delay defendant Dato's appeal.

According to her deposition, Patricia Kujak was a passenger in an automobile driven by Beck on February 9, 1968, at 11:00 P.M. when "the car stalled." They were "already on Grand Avenue," turned in an easterly direction, completely out of the parking lot, a portion of the car in the eastbound lane and a portion of the car in the westbound lane. As they pulled out, they "were going south and when we stalled we were Southeast. As we pulled out onto Grand Avenue, the car stopped." When she first observed the other car, there seemed to be enough time for him to stop; the vehicle she was in was disabled"just a few seconds."

Defendant, cross-plaintiff Rodemar Beck, testified at a deposition that he and Patricia Kujak had been at a bowling alley for about an hour before the accident, had one drink, and listened to the band. He stopped his car twice before the accident, once before the sidewalk while he was still in the parking lot and the second time "at the edge of the curb," with his front wheels "about on the curb." Two cars were parked west of the driveway. Entering Grand Avenue, he looked first to the east and then to the west and saw no traffic. His headlights were on. He saw the other car before the impact about 50 feet away from him switching from the outside lane toward

the curb: "When I saw these headlights my car was stopped. At this time my front wheels were still on the curb and my right foot was on the brake. The motor was not running, the motor died out."

Defendant, Mario Dato, testified at his deposition that the weather was dry and cold and he was travelling east on Grand Avenue on his way to work. His front end, from headlight to headlight, came into contact with the front left side of Beck's car. The first knowledge he had that he had been in an accident was when he "came to" after the accident, having been rendered unconscious, and saw his hood up and people around. He never saw Beck's car before the collision occurred. He was travelling approximately 30 miles an hour and was in the lane between the center line and the parked cars on his right. The collision "occurred right at the driveway" to the parking lot of the bowling alley-lounge, which was to his right, and there were approximately five or six cars parked there. He did not "specifically look at the driveway," but glanced because he knew there was a driveway there but did not see any cars in the driveway. He was looking straight ahead at all times in the one block before the accident.

Defendant Dato's attorney also filed an affidavit in which he stated plaintiff, Patricia Kujak, had given a statement to an investigator for the insurance company of the car in which she was riding, in which she stated that she and Beck had consumed "two alcoholic drinks each" at the bowling alley, that they had been on the highway "approximately one second in an effort to make a left hand turn" before the collision, and "that the car she was in stalled and the driver of her car became paralyzed and did not have enough time to do anything."

Section 57(3) of the Civil Practice Act provides that summary judgment should be rendered if "there is no genuine

issue as to any material fact" and the moving party is entitled to judgment as a matter of law. The right of a party to invoke this remedy must be free from doubt and the purpose of the procedure is to determine whether there is a genuine issue of material fact, not to try it. The issue here, for example, is not whether, on the evidence, a sufficient showing has been made that Dato was negligent, but whether there is any dispute between the parties as to that fact. Ray v. The City of Chicago (1960), 19 Ill. 2d 593, 599, 169 N.E. 2d 73.

Generally, negligence is a question of fact. A situation similar to that presented here was considered by the court in Simaitis v. Thrash (1960), 25 Ill. App. 2d 340, 166 N.E. 2d 306, which reversed an order of summary judgment when the testimony given by the witnesses on their depositions conflicted concerning, for example, the speed of the defendant's automobile as it approached an intersection. There was a question about which car entered the intersection first, whether the plaintiff should have seen (though he did not) defendant's vehicle or whether it "might be inferred" from the testimony that defendant's car was not within plaintiffs' view "when they first looked," the court stating (25 Ill. App. 2d 340, 349-351):

> "Whether a given course of conduct amounts in law to negligence or contributory negligence depends on its character and attending circumstances; if the acts or omissions complained of so contravene the prompting of ordinary caution that reasonable minds without doubt or hesitation would agree that no careful person would be guilty thereof, then such conduct is per se negligence or contributory negligence. Crowe Name Plate & Mfg. Co. v. Dammerich, 279 Ill. App. 103, 45 Corpus Juris, p. 643, Section 4.
>
> The question of contributory negligence ordinarily and pre-eminently presents a question of fact. It can become a question of law only when from the undisputed facts, all reasonable minds, in the exercise of fair and honest judgment, would be compelled to reach the conclusion that there was contributory negligence. Lasko v. Meier, 394 Ill. 71, 67 N.E. 2d 162.

* * *

> "We, therefore, conclude that whether the driver of plaintiff's car was guilty of negligence and whether the plaintiff was guilty of contributory negligence in not looking before they did and not seeing defendant's car when they did look for the first time, presents a genuine triable issue of material facts which should be passed on by a jury."

In the case at bar, there is serious conflict in the testimony. For example, Beck states there were only two parked cars, Dato says there were five or six. Kujak states the vehicle was stopped "a few seconds," but is alleged to have said "one second" to the insurance investigator. Beck does not say precisely how long he was stalled, but says he saw the Dato vehicle when it was 50 feet away, but he does not say he sounded his horn or otherwise attempted to warn Dato. It is, consequently, possible that the Beck vehicle was not stalled but suddenly emerged from the driveway from behind the parked vehicles which obstructed Dato's view.

The depositions and affidavits in this case do not clearly show either the negligence of the defendant or the absence of contributory negligence of the cross plaintiff. Dato's statement that he did not see the Beck car prior to the collision is not, in itself, undisputed evidence that he failed to keep a proper lookout and was, consequently, negligent. Whether Dato "should have seen" Beck's car depends upon an appraisal of all the circumstances and on whether Beck and his passenger told a story that is worthy of belief.

Since the version of the accident given by the defendant in the depositions is not consistent with that given by the plaintiff and the cross plaintiff, the judge was required to, and apparently did, weigh the evidence in order to determine which version of the accident to believe. This he cannot do. Fletcher v. Boxx (5th Dist., April 2, 1973) ____ Ill. App. 3d ____, ____ N.E. 2d ___, General No. 71-262, slip opinion, page 4.

Under these circumstances, the determination of whose story was to be believed and what the causal factors of the collision were in fact, can only be resolved by a jury after a trial upon the merits.

Accordingly, the grant of summary judgment is reversed and the cause is remanded for trial.

Reversed and remanded.

* Second Division, Stamos, P.J., did not participate.

Publish abstract only.

58122, 58123, 58124, 58125, 58126 & 58127

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County,
vs.	)	
CLARENCE ROBERTS, a/k/a WILLIAM ROBERTS, Defendant-Appellant.	)	Honorable Philip Romiti, Judge Presiding.

PER CURIAM:*

On June 27, 1972, defendant entered a plea of guilty to six separate indictments charging him with nine counts of armed robbery and two counts of aggravated assault. He was sentenced to a term of five to fifteen years on each of the armed robbery counts and a term of one to five years on each of the aggravated assault counts, concurrently.

Defendant wished to appeal and the public defender of Cook County was appointed to represent him, but after examining the record, the public defender filed a petition in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the petition has also been filed. That brief in effect states that an appeal in this case would be wholly frivolous. On April 6, 1973, defendant was mailed a copy of the motion and brief. He was informed he could file any points he might choose in support of his appeal before June 11, 1973. He has not responded.

The petition and brief of the public defender allege that the only possible basis for an appeal would be whether the trial court's admonishments to the defendant prior to his plea of guilty were adequate. Illinois Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402) sets forth the requirements which must be substantially complied with by the trial judge in accepting a plea of guilty.

In the case at bar, the trial judge, prior to accepting the plea of guilty, determined that the defendant understood the nature of the charges, the maximum and minimum sentence for each of the crimes charged, the fact that he had a right to plead not guilty and persist in that plea and that by pleading guilty he waived his right to a jury trial, a bench trial and the right to confront witnesses against him. The trial judge also determined that there was a factual basis for the plea and that defendant's plea was voluntary. The results of the pretrial conference were made part of the record prior to accepting defendant's plea of guilty. The trial judge's admonishments were more than sufficient to comply with Supreme Court Rule 402.

We have examined the record and concur in the opinion of the public defender that the argument thus raised does not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for appeal which are also not frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel for the defendant on appeal, and the judgment of conviction is affirmed.

PETITION ALLOWED;
JUDGMENT AFFIRMED.

*SECOND DIVISION.

LEIGHTON, J., did not participate.

PUBLISH ABSTRACT ONLY.

13 I.A. 276
July 19/73

58143

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	
CHARLIE WARLICK, JR., Defendant-Appellant.	HONORABLE CHESTER J. STRZALKA, Presiding.

PER CURIAM:*

The defendant, Charlie Warlick, Jr., was convicted of the unlawful use of weapons, following a bench trial, and was sentenced to a term of six months in the House of Correction. Ill. Rev. Stat. 1971, ch. 38, par. 24-1 (a) (4). On appeal, he contends that the State did not show the weapon was "concealed" on his person, that the State did not prove that his conduct was not the result of necessity, and that the six months sentence is excessive.

Chicago Police Officer Gerald Wojnar testified that on April 1, 1972, at about 2:00 A.M., he was assigned to "a fight on the street" at 7534 N. Clark Street. On arrival, he observed about 50 people milling around and pushing and shoving each other in a parking lot. Chicago Police Officer Ciechon arrived at about the same time and together the two officers approached the group. A woman's voice said, "Who's got the gun now?", and a male voice answered, "Charlie's got it." As the officers walked into the crowd to disperse them, about six or seven males walked from the crowd into a dark area of the parking lot and the officers followed at a distance of about ten feet. Defendant separated from the crowd and walked off by himself and the officers followed him. Defendant's coat was open and as he turned to face the officer, the officer could see a weapon on his left hip, tucked inside his trouser belt. When the officer saw this, he started to walk toward the defendant; the defendant immediately turned away from him and started to walk away; defendant reached

into his coat, pulled out the weapon, and brought it down to his side. The officer walked up behind the defendant, who dropped the weapon onto the asphalt. Defendant's coat was "approximately thigh length." When asked if the coat "would cover the entire position of the gun," the witness answered that it would "if the coat was closed" but it was not closed, but open. The incident happened near a passageway behind a tavern between the tavern and the nearby railroad tracks.

Chicago Police Officer Michael Ciechon testified in corroboration that both he and Officer Wojnar approached the defendant with guns drawn. Questioned whether defendant would have seen him draw his gun, he answered: "It was dark. I don't know if he saw it or not."

Charles Warlick, the defendant, testified that, as he started into the parking lot, a lady ran up and said to him, "Donnie (co-defendant Donald Montgomery) has a gun," and he grabbed Donnie by the arm, asked what he was going to do with the gun, started to wrestle with him, and Donnie let go of the weapon. Defendant turned to his left and two police officers were standing there with their pistols drawn. He placed the weapon down alongside him, walked past the police officers, dropped it underneath a car, and was arrested. He explained he wrestled with Donnie because he was afraid the weapon would go off and hurt someone, that somebody would have been shot. An objection, on the ground of being "repetitious," was sustained to questions concerning defendant's belief that some injury might have occurred and as to the reason why he took the gun away from Montgomery.

Donald Montgomery testified that at approximately 1:30 A.M., he was in the possession of the gun for two or three minutes. He picked it up from the ground; a young lady screamed he had a gun; defendant wrestled it from him; by that time the police came, so defendant walked away and dropped the gun under the car.

Officer Ciechon, recalled to the stand as a rebuttal witness, testified he did not see the defendant at any time wrestle with Montgomery and that when the defendant moved away from the crowd,

Montgomery was on the sidewalk some 40 or 50 feet away from the defendant.

The defendant first argues that the weapon in question was not "concealed" as required by Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a) (4). He relies on People v. Crachy (1971), 131 Ill.App.2d 402, 268 N.E.2d 467, where a pistol tucked in a waistband of the defendant's trousers was held not concealed, the court stating (131 Ill.App.2d 402, 403) that concealment depends upon "an actual covering or obstructing of the weapon in such a manner as to at least make difficult its recognition as a firearm." The State relies on People v. Russell (1959), 23 Ill.App.2d 13, 161 N.E.2d 583, where a police officer came upon defendant pointing a pistol at three men scuffling nearby, and ordered defendant to drop the gun; but the defendant instead pocketed the weapon, which was held sufficient to support a conviction for concealment, the court pointing out that the statute does not require that the weapon be carried so "as to give absolutely no notice of its presence," but merely that it "be concealed from ordinary observation" (23 Ill.App.2d 13, 15). In the case before us, the trial judge was justified in finding that defendant intended to conceal the weapon from the evidence that the defendant turned away from the police and that the defendant's coat would have hid the weapon from "ordinary observation" from rear or side by the police officers who were following defendant.

Defendant next argues that the court committed reversible error in refusing to allow the defendant to testify as to his reasonable belief for the necessity of his act. The record shows, however, that defendant did in fact testify he was afraid the weapon might go off and that someone would get hurt. Defendant cites no case law for his proposition that his belief that someone would get hurt - without more - is the type of necessity for concealment contemplated by chapter 38, paragraph 7-13. Defendant, here, has not made a prima facie showing of necessity to conceal. See People v. Dalton (1972), 7 Ill.App.3d

442, 287 N.E.2d 548.

Finally, defendant argues that the sentence is excessive. The maxiumum sentence under paragraph 24-1 of the Criminal Code is imprisonment not to exceed one year. The reviewing court's power to reduce the punishment imposed by the trial court is to be exercised with caution and circumspection. People v. Johnson (1972), 5 Ill.App.3d 718, 284 N.E.2d 48. In aggravation, the State here showed four prior convictions for violent crimes against the person: Battery in 1965, $10 fine; Battery in 1966, 3 months supervison; Aggravated Battery and Disorderly Conduct in 1967, $50 fine; Resisting Arrest in 1967, 6 months probation. In mitigation, defendant's argument was that he was a family man who recently took a new job. Since the sentence imposed is within the statutory limit, and since the defendant's record showed four previous convictions for crimes of violence, this is not an appropriate case for the exercise of our authority to modify the sentence under Supreme Court Rule 615.

Accordingly, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

*Second Divison

Downing, J., did not participate.

57542

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. STAN SCOTT, a/k/a LESTER STANLEY SCOTT, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE KENNETH E. WILSON, Presiding.

PER CURIAM:

On February 22, 1972, the defendant, Stan Scott, also known as Lester Stanley Scott, entered a plea of guilty to an indictment charging him with the offenses of aggravated battery and attempted murder. He was sentenced to a term of one to four years. On appeal he argues that the trial court erred in accepting his plea of guilty without first admonishing him of his rights under the four-term act [Ill. Rev. Stat. 1971, ch. 38, par. 103-5(a)].

On February 22, 1972, defendant was arraigned and his case was assigned to the Honorable Kenneth E. Wilson. The assistant public defender appointed to represent defendant stated that the matter had come up for arraignment on the 119th day of the term and he was ready to proceed with trial, but the defendant was requesting a pretrial conference with the court. After the conference defendant stated that he wished to withdraw his plea of not guilty and enter a plea of guilty. He was then specifically advised that on the charge of aggravated battery he could be sentenced to a term of one to ten years, and a term of one to twenty years on the charge of attempted murder. He was further advised that he had a right to plead not guilty; that by pleading guilty he waived his right to a jury trial or, in the alternative,

a bench trial; and that he waived his right to be confronted by all witnesses against him and to cross-examine those witnesses. Defendant stated that he was entering his plea of guilty voluntarily because he was guilty, knowing that at the pretrial conference the trial judge had indicated he would impose a sentence of one to four years. The trial judge then accepted the plea of guilty and, after a stipulation to the facts, sentenced defendant to a term of one to four years.

Relying on Boykin v. Alabama, 395 U.S. 238, and Supreme Court Rule 402 [Ill. Rev. Stat. 1971, ch. 110A, par. 402], defendant argues that it was error for the trial judge to accept his plea of guilty without advising him as to his rights under the four-term act. Boykin does not in any way alter or modify the constitutional standards by which the validity of a plea of guilty is to be determined. The constitutional requirement is that a plea of guilty be intelligently and voluntarily made. This requirement has been the law in effect in Illinois since 1948. People v. Reeves, 50 Ill. 2d 28, 276 N.E. 2d 318. Boykin has added a requirement that if a plea of guilty is to stand, the record must disclose that the defendant entered the plea understandingly and voluntarily. With the intent to implement the Boykin decision, the Illinois Supreme Court adopted Rule 402, which enumerates certain requirements which must be met before a guilty plea can be accepted. The rule does not require a strict, literal adherence to every word, but rather requires only substantial compliance with its terms. People v. Mendoza, 48 Ill. 2d 371, 270 N. E. 2d 30; People v. Shepard, 10 Ill.App. 3d 739, 295 N. E. 2d 310. Rule 402 states:

In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including,when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

(b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

There is nothing in Boykin or Supreme Court Rule 402 which requires that a defendant be advised of his rights under the four-term act. In the case before us the defendant was specifically admonished as to the possible sentences he could receive, the results of the pretrial conference, that he had a right to plead not guilty, and that by entering a plea of guilty he was waiving his right to a jury trial or a bench trial, and his right to confront the witnesses against him. Defendant stated that he was entering the plea of guilty voluntarily because he was guilty, knowing the results of the pretrial conference. The trial judge complied with all of

the requirements of Boykin and Supreme Court Rule 402. An examination of the record in the case before us in no way indicates that defendant's plea of guilty was not understandingly and voluntarily made.

Further, we note the record demonstrates that defendant was aware of his rights under the four-term act. Prior to requesting a conference with the court, the defense attorney stated that he had talked to the defendant and that the case had come off of the arraignment on the 119th day of the fourth term. The attorney had advised defendant that he was prepared to go ahead with the trial, but the defendant requested a conference with the court. These statements demonstrate that the defendant was aware of his right to proceed with trial within 120 days of his incarceration, but the defendant wanted to have the pretrial conference. The record reveals that the victim was present in court at defendant's plea, and the case was ready to go to trial. Defendant's plea of guilty was knowingly, understandingly and voluntarily made, and he was denied none of his constitutional rights.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

THIRD DIVISION.

Justice McGloon did not participate.

72-205

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE GLENN K. SEIDENFELD, Justice
HONORABLE THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On August 2, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 72-205

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Fifteenth
v.	)	Judicial Circuit,
	)	Stephenson County,
GLEN STERKOWICZ,	)	Illinois.
	)	
Defendant-Appellant.	)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, Glen Sterkowicz, was indicted for aggravated assault, and was found guilty in a jury trial. On November 12, 1971, judgment was entered finding defendant guilty of "Aggravated Battery". This error went unnoticed by the State until after defendant had been incarcerated, a notice of appeal had been filed (and, defendant notes, after he had filed a petition for a writ of habeas corpus alleging that the error in the record rendered his sentence void, the disposition of which does not appear in the record). On April 5, 1972, on motion by the State, the circuit court entered a nunc pro tunc order as of November 12, 1971, amending the record to show that the judgment of conviction and sentence were on the verdict of aggravated assault.

On appeal from his conviction, defendant contends that the judgment upon an offense for which he was not indicted is void, and that the trial court was without jurisdiction to amend the judgment and sentence by an order nunc pro tunc. He also argues

that he was not proven guilty beyond a reasonable doubt, and that the court erred in the giving of instructions.

In support of his first contention, defendant cites authorities to the effect that the trial court is without jurisdiction to vacate, set aside, or modify a judgment more than 30 days after the judgment was rendered, or after the defendant has commenced serving his sentence. (People v. Wakeland (1958), 15 Ill.2d 265; People v. Heard (1947), 396 Ill. 215; People v. Hayes (1969), 108 Ill.App. 2d 359.) However, we agree with the response of the State that the court's order was not a modification, but a correction of the record. The record in a criminal case may be amended by an order nunc pro tunc after the term at which it was made has elapsed, defendant has begun serving his sentence, and writ of error has been filed, when by reason of clerical error it does not speak the truth, provided there is a memorial by which the court is able to determine that there was in fact an error on the part of the clerk in the entry of the judgment. (People v. Glenn (1962), 25 Ill.2d 82, 84-5; People v. Michael (1961), 23 Ill.2d 338, 340.) This principle has often been applied to situations where the judgment omitted or misstated the offense of which defendant was convicted. People v. Glenn (1962), 25 Ill.2d 82; People v. Michael (1961), 23 Ill.2d 338; People v. Marx (1952), 411 Ill. 222; People v. Kargula (1918), 285 Ill. 478.

Here, defendant was served with notice of the hearing on the petition to correct the record, and was represented by counsel. The correction of the record was based on the transcript of proceedings and common law record, which showed that defendant was indicted for aggravated assault, that the trial was conducted on this charge, with aggravated battery nowhere mentioned, and that the jury's verdict was on the charge of aggravated assault. The transcript and record satisfy the requirement of a memorial (People v. Michael (1961), 23 Ill.2d 338, 340; People v. Valentine

(1965), 60 Ill.App.2d 339, 350-1), and establish that there was an error in the entry of judgment. Defendant's contention that the trial court lacked the power to correct its record by an order nunc pro tunc is not well taken.

The record as corrected obviates defendant's contention that the judgment upon an offense for which he was not indicted is void. Contentions based on a faulty record cannot be sustained when the record is corrected. People v. Glenn (1962), 25 Ill.2d 82, 85.

Defendant's contention that he was not proved guilty of aggravated assault beyond a reasonable doubt demands an examination of the evidence.

The incident in question occurred in the early morning hours of September 23, 1970, at which time defendant was staying at the McConnell, Illinois, home of his friend, Keith Kleckler. Kleckler had previously been engaged to Mary Jane Rhea, who lived in Freeport, Illinois, but, according to defense witnesses spent almost every evening during the month of September riding through McConnell and past Kleckler's home, stopping and honking, and generally harassing him. She was often accompanied by Wayne Offenheiser, and was always driving his car.

On the evening of September 22, 1970, Rhea and Offenheiser made either two or three trips to McConnell, depending on which witnesses are believed. On the first trip, Keith Kleckler saw them and followed in his car for the alleged purpose of stopping them and finding out why they were harassing him. He drove all the way to Lena, Illinois, but was unable to stop them. In Lena, he met defendant and told him what had transpired. They returned to Kleckler's home in McConnell, and defendant remained there while Kleckler set out for Freeport to see if he could find Mary Jane Rhea.

A short time later, according to defendant, Rhea drove by with Offenheiser in the passenger seat. Defendant, seeking to find out

what they wanted, got in his car and followed them. He pulled even with them at a stop sign, and Offenheiser began shouting obscenities and started to get out of the car with a knife. Rhea then started to pull away without him, and he jumped back into the car.

The testimony of Rhea and Offenheiser does not refer to this incident, and Rhea denies that either of them had a knife, although the defense presented testimony of Rhea's roommate to the effect that Rhea admitted to her that a knife was in the car.

Defendant states that he returned to the Kleckler home in McConnell, where he met Keith's parents and told them what happened. As he finished the story, Rhea drove by again. Defendant got in his car, and was joined by Keith's father, Kenneth Kleckler. They followed for the alleged purpose of protecting Keith Kleckler from Offenheiser's knife. While they could not see Offenheiser in the car, they knew he was there because Rhea turned and talked to someone in the back. (According to Rhea and Offenheiser, he was sleeping in the back.) They tried to pass her in order to stop her car, but she allegedly attempted to run them off the road into a milk tanker. They continued following her and Kleckler hollered for her to stop. When she did not, Kleckler took a gun from his belt and fired two warning shots into the air. When she still did not stop, Kleckler fired four shots at the car's right rear tire. At this point the cars were going 55 to 60 miles an hour. Rhea stated that she was scared and tried to go faster; defendant and Kleckler stated she did not accelerate. Kleckler and defendant said they saw sparks from the bullets on the pavement and none could have hit the car, but Offenheiser and Rhea stated that they later found a hole in the driver's door that was not there previously, and police officers verified that there was a hole in the door. Defendant and Kleckler followed for about one and one-half miles waiting for the tire to go flat, but when it did not they returned to McConnell. The tire later did go flat, and two bullets were found in it.

Defendant testified on direct examination that he did not know Kleckler had a gun until he fired the two warning shots. Defendant continued to follow Rhea's car after these shots, and Kleckler then fired at the tires. Defendant said there was a pause after every shot, and that all six shots were fired within a quarter of a mile or a little more and could not have taken over a minute or two. After the shots, they followed for another one and one-half miles, and then returned to McConnell.

On cross-examination, defendant was questioned about a statement made by him to police that "Ken Kleckler went to get his gun, a .38 caliber police special, and we got into the car", and he said that the statement meant only that Kleckler had done it, but not that he knew about it at that time. He agreed with the earlier testimony of a police officer that during interrogation he never denied knowledge that Kleckler had a gun, but said that this was because the question was never asked. Defendant stated that he tried passing Rhea's car several times before the shots were fired and that he also attempted to pass after the shots were fired. He said he did not object to Kleckler's having a pistol after the warning shots because he did not have time, although he said there was a pause after the warning shots. He also said he did not attempt to bring the car to a halt after the first two shots, but instead continued in pursuit.

Kenneth Kleckler testified that when he took the gun from his own car before getting into defendant's car, defendant was standing nearby but was not right with him. He said that when he fired in the air, defendant just kept following the other car. He said he paused between each shot to see if the tire would go flat, and that they went through an S curve, where defendant had to turn the car three different ways, between the fourth and fifth shots.

The State does not contend that defendant fired the shots, but argues that the evidence supports his conviction under

accountability principles. We agree. First, while defendant says he did not know of Kleckler's gun until the warning shots, his statement to police and his proximity to Kleckler when the latter obtained the gun could lead the jury to believe to the contrary. Moreover, even if defendant were not aware of the gun at that point, he became aware of it when the warning shots were fired but did not object or make any effort to stop the car although there were pauses between each shot. Instead, he continued to follow the Rhea car and attempted to pass it. While mere presence or negative acquiescence is insufficient to make defendant accountable for another's acts, one may aid and abet without actively participating in the overt act, and presence at the crime without disapproving or opposing it may be considered with other circumstances to reach the conclusion that the person assented to the commission of the crime and thereby aided and abetted. (People v. Nugara (1968), 39 Ill.2d 482, 487; cert.den. 89 S. Ct. 257, 393 U.S. 925, 21 L.Ed.2d 261; People v. Barnes (1971), 2 Ill.App. 3d 461, 464.) Miss Rhea's statement that she was scared when the shooting started contradicts defendant's contention that she was not apprehensive of receiving a battery. In view of this evidence, the finding of the jury should not be disturbed. See People v. Reese (1973), 54 Ill.2d 51, 58.

Defendant argues that the indictment charged him only as a principal, and he therefore cannot be convicted as an accessory. In this regard, he says the court erred in giving an accountability instruction to the jury. However, the well settled law of Illinois is that an accessory can be indicted and tried as a principal, and that this does not abridge his constitutional right to be informed of the nature of the accusation against him. (People v. Nicholls (1969), 42 Ill.2d 91, 100; cert.den. 396 U.S. 1016, 24 L.ed.2d 507, 90 S.Ct.57; People v. Heuton (1971), 2 Ill.App.3d 427, 428.) Defendant's contention is thus without merit.

Defendant's final contention is that, since the indictment charges only that defendant assaulted Rhea with a deadly weapon, the court erred in instructing the jury that it could find defendant guilty if it found him to have committed an assault on a public way. However, unmentioned by either party is the fact that the indictment was amended, without objection, to include the charge that the assault took place on a public way. Defendant's contention is therefore baseless.

We affirm the judgment below.

Affirmed.

GUILD, P.J. and THOMAS J. MORAN, J. concur.

No. 72-145

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Fayette County.
-vs-	)	
MICHAEL LEE DAVIS, Defendant-Appellant.	)	Honorable Paul M. Nickman, Judge Presiding.

MR. JUSTICE GEORGE J. MORAN delivered the opinion of the court:

Appellant was convicted of the offenses of burglary and theft and sentenced to the Illinois State Penitentiary for a period of not less than two nor more than six years on each offense.

The following issues are presented for review: (1) Whether the State proved defendant guilty beyond a reasonable doubt; (2) whether the court erred in instructions to the jury; (3) whether the court could properly impose separate sentences on the two counts of the indictment; and (4) whether the sentence imposed was excessive.

Some of the above issues present serious problems for this court's consideration. Unfortunately, appellee has not filed a brief in this case.

For the reasons stated in Shinn v. County Bd. of School Trustees of Marion Co., 130 Ill.App.2d 908, 266 N.E.2d 123, we reverse the judgment of the Circuit Court of Fayette County pro forma.

Reversed.

CONCUR:

Honorable Edward C. Eberspacher
Honorable Caswell J. Crebs

PUBLISH ABSTRACT ONLY.

72-187

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE GLENN K. SEIDENFELD, Justice
HONORABLE WALTER DIXON, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On August 7, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 72-187

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from
	)	Mc Henry County
v.	)	
	)	Hon. Leonard Brody,
RICHARD E. ANIBALLI, JR.,	)	Judge presiding
	)	
Defendant-Appellant	)	

Mr. PRESIDING JUSTICE GUILD delivered the opinion of the court:

The defendant was charged for failure to yield the right-of-way under the Illinois Vehicle Code, Ill. Rev. Stat. (1971), Ch. 95½, Sec. 11-906. He was tried by the court, found guilty, and fined $15.00 and $5.00 costs. He appeals.

About 9:00 o'clock on the evening of September 1, 1971, the defendant and a passenger drove westerly out of the parking lot of a business establishment called "The New Place" onto State route 31. At this point, State route 31 consists of two lanes with a paved emergency lane on either side. Defendant testified he entered the highway, turned left in a southerly direction on the main south bound lane. After he had gone a distance variously described as thirty to fifty feet, he heard the screeching of brakes and saw the lights of a car driven by one Joseph Dernbach coming from the north. He then speeded up his vehicle. Dernbach went on to the paved emergency lane, off of that lane onto the grassy area, struck a motor vehicle parked there, and then slid

into another vehicle parked in front of that car which was occupied by Detective James R. Conley.

State trooper Keenum testified that defendant told him he did not see the Dernbach car. Detective Conley testified that he saw the defendant's car approach the highway from the parking lot, slow down to 5-10 miles per hour, and then enter the highway turning south. He also testified that at the same time he saw the Dernbach car three-fourths of a mile away. Upon direct examination, Detective Conley testified that his estimate of Dernbach's speed was approximately 55-60 miles per hour. Upon cross examination however, he testified that Dernbach could have been going 70-80 miles per hour. The witness, Dernbach, did not testify. The defendant and his passenger both testified that there were vehicles parked on the grass obscuring the vision to the north and that both the driver and the passenger looked for approaching vehicles from the north, that they saw none, and both further testified that they stopped before entering the highway.

No court reporter was present and the matter has been submitted to this court on a bystander's record consisting of "an agreed summary of testimony," "answer to agreed summary of testimony" and the "court's comments on summary of evidence and argument."

As indicated above, the defendant was charged under Ill. Rev. Stat. (1971), Ch. 95½, Sec. 11-906, which reads as follows:

> "The driver of a vehicle about to enter or cross a highway from an alley, building, private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered."

The trial court in its summary stated that contributory negligence was not an issue and that the only issue was whether defendant violated the statute with which he was charged. The court found that such violation had been proved beyond a reasonable doubt.

If, in fact however, the defendant failed to stop as testified to by the purported eye-witness, he should have been charged under Ill. Rev. Stat. (1971) Ch. 95½, Sec. 11-1205, which reads in pertinent part as follows:

> "The driver of a vehicle emerging from an alley, building, private road or driveway within an urban area * * * shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic thereon, * * * and upon entering the roadway shall yield the right-of-way to all vehicles approaching on such roadway."

The definition of an urban area is applicable here which states that an urban area is "any incorporated or unincorporated area developed primarily for residential and/or business purposes." Ill. Rev. Stat. (1971) Ch. 95½, Par. 1-214.1.

In this court's opinion, the finding of the trial court is against the manifest weight of the evidence. The defendant was driving out of a business establishment. Detective Conley testified that he saw the defendant approach and enter the highway, turn south, and at the same time saw the Dernbach vehicle. Defendant's vehicle was upon the highway, had made its turn, had proceeded southerly some 30-50 feet when the Dernbach vehicle was driven off the south bound lane onto the paved emergency lane and then onto the grass striking the two vehicles. On direct

examination Detective Conley, as indicated above, testified that he estimated the Dernbach vehicle was traveling 55-60 miles per hour and was three-fourths of a mile away at the time he saw both the defendant's and Dernbach's vehicles. At 60 miles per hour traveling 88 feet per second, it would have taken Dernbach three-fourths of a minute to travel the three-fourths of a mile before reaching the point where his car struck the two parked vehicles.

The defendant was not charged under Ill. Rev. Stat. (1971) Ch. 95½, Sec. 11-1205 requiring him to stop before entering the highway. The statute under which he was charged merely provides that he yield the right-of-way. That is to be construed in a reasonable manner and should not cover the situation where the driver of an approaching vehicle is traveling at an excessive rate of speed so that he could not control his vehicle, which in the instant case would have caused a rear end collision, had he not driven onto the paved emergency lane and then onto the grass alongside the road.

While we will not substitute our judgment for that of the trial court unless that judgment is against the manifest weight of the evidence, it is apparent that the Dernbach vehicle was traveling at a greater rate of speed than testified to by Detective Conley on direct examination. As further indicia of this, he was unable to travel on the paved emergency lane but went off that lane onto the grass where he struck the vehicles. We do not believe that the defendant was found guilty beyond a reasonable doubt of violation of the statutory provision under which he was charged.

REVERSED.

J. SEIDENFELD and J. DIXON Concur.

72-210

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE THOMAS J. MORAN, Justice
HONORABLE GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On August 7, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 72-210

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

MAVIS M. COLEMAN, f/k/a MAVIS M. BROWN, Plaintiff-Appellant,	)	Appeal from the Circuit Court of the 15th Judicial Circuit, Ogle County, Illinois.
v.	)	
WAYNE O. BROWN, Defendant-Appellee.	)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Plaintiff appeals from an order entered April 6, 1972, providing that the custody of one child remain with her, that the custody of two older children remain with the defendant, and that visitation rights be denied to both parties.[1]

The judgment order from which the appeal is taken was preceded by a history of constant disagreement between the parties over the children following the divorce on June 6, 1968. In the original decree, custody of the three children, George (then age 9), Mark(then age 6), and Brian (then age 4), was given to plaintiff. Visitation rights of defendant were again adjusted on October 24, 1968. In response to defendant's petition for a transfer of custody of all the children, an agreed order was entered

1 Defendant cross-appealed from that portion of the judgment order denying him custody of the youngest child but has abandoned his cross-appeal.

on February 4, 1969, which found that the circumstances of the parties had materially changed, that defendant was fit, and that plaintiff was unable, due to reasons of illness, to have custody. The court transferred custody to defendant until further order and gave plaintiff visitation.

On March 7, 1969, defendant petitioned to have plaintiff's visiting rights suspended alleging an attack on defendant's home and threats to himself and his wife and impairment of the children's safety. On March 28, 1969, the court ordered plaintiff's visitation reduced.

On July 17, 1970, defendant again petitioned to suspend plaintiff's visitation privileges alleging various grounds relating to the children's welfare. Plaintiff, now married to Ronald Coleman, on July 28, 1970, in turn petitioned for return of custody of her children. She alleged her remarriage, residence in her own home, the unfitness of defendant, and the fact that defendant, his wife, and the children lived in a house trailer. By stipulation a guardian ad litem was appointed on November 4, 1970, and it was further stipulated that the judge would conduct an interview with the minor children. On December 1, 1970, both petitions were denied and the status quo preserved.

On July 26, 1971, plaintiff again petitioned for custody. The transcript of the testimony at the September 22, 1971, hearing on this petition is incorporated in the record on appeal although the order entered October 4, 1971 denying a change of custody, and modifying visitation rights, was not appealed.

On November 15, 1971, plaintiff filed a petition to have defendant held in contempt for allegedly mistreating Brian. On November 18, 1971, the court ordered Brian placed in his mother's custody "for the reason that *** (her) home will be more conducive to *** (the) child's physical and psychological well-being." Visitation was not specified.

On March 27, 1972, plaintiff petitioned for a setting of visitation alleging that since Brian's custody had been changed, the parties had not been able to agree on visitation. Plaintiff also requested that the children be present for conference with the court. On April 6, 1972, the court's order was entered, from which this appeal has been taken, retaining the previous custody arrangement but denying visitation to each of the parties.

As is the case with all of the proceedings except for the hearing on September 22, 1971, there is no transcript of the evidence taken at the hearing culminating in the April 6th order. The notice of appeal was filed on April 19, 1972. However, on June 21, 1972, the judge filed a memorandum which gave a chronology of events leading up to the present proceeding. The memorandum describes the circumstances underlying the present order from which the appeal has been taken. In the memorandum the court states that both parties stipulated to the judge talking separately and alone to the boys; that the two oldest boys stated their stepfather licked them; that when they visited their mother they never saw their brother, and that Brian had his own friends; that regular visitation interrupted their activities and baseball programs and that they preferred to discontinue the visitation; that Brian expressed a desire to stay with his mother because he had his friends in Rockford and did not care about going to his father's home, and said he would be happier without visitation privileges. The court stated in the memorandum that prior to the conference the parties agreed that the visitation was not working as they lived in different cities; that after the conference the judge explained the circumstances to both parents and stated that he felt it in the best interests of the boys if they remained with their respective parents without visitation since it had caused so much inconvenience and confusion. The court stated that everyone agreed and that the order which was entered amounted to an agreed order.

Plaintiff contends that custody of all of the children should have been restored to her, since they are all of tender years, she is a fit mother, the original change of custody was without fault on her part, she has since remarried, and has a good home. She argues that the court's memorandum contains extraneous matters which cannot serve as a basis of the court's decision; and that evidence from the guardian ad litem should have been heard. She also contends that the order is inequitable in denying her visitation.

Defendant contends that plaintiff did not satisfy her burden of showing a sufficient change of circumstances to justify a change in custody; that the court has broad discretion in admitting evidence which may assist it in arriving at a custody decision, including a consideration of the wishes of the minor children expressed off the record. He argues that an order temporarily denying a mother all visitation is proper under the circumstances here.

Plaintiff's argument as to custody must fail for the reason that all of the considerations she urges now were before the court in the September 22, 1971 hearing resulting in the order of October 4, 1971, denying her custody of the two older children, no appeal having been taken from that order. Moreover, in earlier proceedings based on plaintiff's July 28, 1970 petition, after plaintiff had remarried and had an adequate home, the court denied custody to her. Finally, the interview with the children disclosed nothing that would help plaintiff's case here.

Other than the objected-to trial court memorandum, there is nothing in the record on appeal to show what transpired at the proceedings resulting in the order appealed from. The recital in that order that the cause was heard and that the court was fully advised in the premises creates a presumption that the judgment order was supported by sufficient evidence since there is no contrary indication in the order or in the record. (Doran v. Doran

(1972), 7 Ill.App.3d 614, 616.) The trial court's determination of the question of child custody should not be reversed unless it is clearly against the manifest weight of the evidence or it appears that a manifest injustice has been done. (Holloway v. Holloway (1973), 10 Ill.App.3d 662, 664-5.) At the time of the April 6 order the two boys had been in their father's custody for three years (now well over four years). Absent a change in circumstances it would appear that it is not unjust to leave children in a satisfactory environment to which they have grown accustomed. (See Leary v. Leary (1965), 61 Ill.App.2d 152, 155.) We find nothing in the record before us to show a change in circumstances following the previous orders which could be a basis for a change in custody.

In reaching this result we have given consideration only to that part of the memorandum of the trial court filed after the appeal was taken which states the result of the court's interview with the children, conducted in chambers by stipulation of the parties.

An interview with the children in custody cases even though not in open court is permissible if stipulated to by the parties. (Oakes v. Oakes (1964), 45 Ill.App.2d 387, 390-395; Stickler v. Stickler (1965), 57 Ill.App.2d 286, 291-292.) To protect the right to appeal, the trial court upon motion should state for the record the substantive part of the child's statement to him. (Oakes v. Oakes (1964), 45 Ill.App.2d 387, 394-395.) While in the instant case neither party requested that the results of the interview be inserted in the record, if necessary the trial court may on its own make such an insertion in appropriate instances. (Supreme Court Rule 329, Ill.Rev.Stat. 1971, ch.110A,par.329.) In child custody cases trial court supplementation of the record on appeal for material omissions is especially justified, since it is the welfare of the children involved, and not the legal strategies of

the parties that is of primary concern. Because the accuracy of that portion of the trial court's memorandum regarding the interview with the children is undisputed, it is properly part of the record on appeal to be considered on review.

On the other hand, a memorandum of opinion of the trial court, while always extremely helpful in indicating the reasoning of the trial court in reaching its conclusion, cannot be made to serve as a substitute for the facts as disclosed by the record. We therefore cannot consider any of the factual statements made in the court's memorandum referring to the chronology of events leading up to the present proceedings.

Similarly, we can give no weight to the conclusion by the court in its memorandum that the order entered below was an agreed order although not so worded. Plaintiff denies that the order was agreed to, suggesting rather that only an acknowledgment and not assent was given. Supreme Court Rule 329 (Ill.Rev.Stat. 1971, ch. 110A,par.329) permits correction of material omissions in the record even after notice of appeal has been filed. However, there must be some written memorial or reflection in the record of the basis upon which the amendment or correction is made. (See Southland Corp. v. Hoffman Est. (1970), 130 Ill.App.2d 311, 317-318.) In the instant case no memorial or basis in the record appears justifying the trial court's subsequent designation of the order appealed from as an agreed order.

Plaintiff's contention that evidence from the guardian ad litem should have been heard is evidently a reference to the September 22, 1971 hearing and is not reviewable in this appeal of a later proceeding.

An absolute denial of visitation has been referred to as inequitable and unjust, unless such denial is clearly shown to be in the best interests of the children. (See Zechman v. Zechman (1945), 391 Ill. 510, 522; Aud v. Etienne (1970), 47 Ill.2d 110, 112-113.)

The broad discretion which the trial court has to adjust the privileges of visitation, to be exercised in the interests of the children and not as a punishment or a reward to either parent, could not justify the permanent denial of visitation on any view of this record. The mother is fit and there is no evidence properly in the record that the children would be harmed by visitation. We therefore interpret the order appealed from as intended to be an expedient to temporarily alleviate conditions contrary to the best interests of the children which had resulted from repeated efforts of the parties to obtain relief from the court in connection with custody. (See Malone v. Malone (1955), 5 Ill.App.2d 425, 428.) As such the temporary order was a proper exercise of discretion.

For the reasons discussed we affirm the judgment order below.

Affirmed.

GUILD, P.J. and THOMAS J. MORAN, J. concur.

57310

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.	)	
	)	
BRUCE SANTORO,	)	HONORABLE
	)	WALTER P. DAHL,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM * (SECOND DIVISION, FIRST DISTRICT):

Bruce Santoro pleaded guilty on September 14, 1965, to Indictment #63-1114, charging Rape, and Indictment #65-1937, charging Indecent Liberties with a Child, and was sentenced to not less than five nor more than twenty years, the sentences to run concurrently. He now appeals from the order of the trial court dismissing, on the State's motion, without an evidentiary hearing, his petition filed under the provisions of the Illinois Post Conviction Hearing Act. Ill. Rev. Stat. 1969, ch. 38, par. 122-1. The only issue is whether the trial court should have held an evidentiary hearing.

Petitioner was charged in 1963 under Indictment #63-1114 with the offense of Rape, allegedly committed on March 29, 1963. On September 13, 1963, a sanity hearing was held before Judge Salter and resulted in a jury verdict that the petitioner "was at the time of the impanelling of this jury and now is insane." He was subsequently admitted to the Illinois Security Hospital, Chester, Illinois, on September 18, 1963, where he remained a patient until July 2, 1964, when he was "released to the Sheriff of Cook County." On June 30, 1965, he was arrested and charged in Indictment #65-1937 with Indecent Liberties with a Child. On September 14, 1965, he entered a plea of guilty to both the 1963 and the 1965 indictments.

His post-conviction petition alleged, inter alia, that his

pleas of guilty were "involuntary because there is no showing that he was competent to stand trial once he was adjudged incompetent to stand trial"; that, after his arrest on the rape charge, a jury had found him incompetent (following the September 13, 1963 hearing); that he was subsequently admitted to the Illinois Security Hospital at Chester, Illinois, pursuant to the finding that he was incompetent to stand trial; that he was subsequently released "upon a Court Order without first empanelling a jury to determine whether or not he was in fact competent to stand trial"; and that his trial counsel were incompetent in that they did not request a jury trial to determine whether he was still incompetent to stand trial after having been released from the Illinois Security Hospital, and in not objecting to the proceeding.

The Report of Proceedings at the time of entry of the guilty plea on September 14, 1965 (which Report accompanied the State's motion to dismiss this post-conviction petition) indicates that the trial judge had received a report of a psychiatric examination made by Dr. Haines and that he distributed copies to counsel for the State and for the petitioner. The judge said the report (which is not in the record) indicated "the defendant is not suffering from any mental disease, knows the nature of the charge and is able to cooperate with his counsel." The judge then admonished the petitioner that he would not have a trial if he pleaded guilty, and the petitioner indicated that he understood that. The judge further advised him of the possible sentence and asked if he still wished to plead guilty, and the petitioner answered that he did. The State's attorney read a stipulation of the facts and the defense counsel presented an argument in mitigation and indicated that he had submitted a report from another doctor, Dr. Ziporyn; he also stated in the course of his plea for leniency: "There is no question that at this time he is

capable of standing trial, but the medical reports which are available indicate that he had a vacillating type of mentality" and continued his argument.

A motion to dismiss a post-conviction petition admits the truth of the allegations and questions only their sufficiency. People v. Wilson (1968), 39 Ill.2d 275, 235 N.E.2d 561. It is clear that competency to stand trial is an issue of constitutional dimension and, as such, properly the subject of a petition under the Post Conviction Act. People v. Robinson (1961), 22 Ill. 2d 162, 174 N.E.2d 820; Pate v. Robinson (1966), 383 U.S. 375, 86 S. Ct. 836, 15 L.Ed.2d 815.

In Dusky v. United States (1960), 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824, the Supreme Court of the United States held per curiam that the record there, taken in its entirety, did not sufficiently support a finding of competency to stand trial under the comparable Federal statute, U.S.C., Title 18, par. 4244, since the record should show affirmatively the exercise of judicial judgment and discretion. See Gunther v. United States (D.C. Cir.), 215 F.2d 493, 496; Bishop v. United States, 350 U.S. 961, affirming per curiam, by implication, the lower court dissent in Bishop v. United States (D.C. Cir.), 223 F.2d 582; People ex rel. Suddeth v. Rednour (1965), 33 Ill.2d 278, 211 N.E.2d 281; Ill. Rev. Stat. 1969, ch. 38, par. 104-3(b).

While a plea of guilty waives all errors not jurisdictional, competency to stand trial, being a jurisdictional issue, cannot be waived. Consequently, trial counsel's remark about petitioner's present competence to stand trial at the 1965 guilty plea is not controlling. The record supports petitioner's claim that he was, indeed, found incompetent to stand trial by a jury on September 13, 1963, and nothing in the record supports the statement of the State's attorney, at the 1971 hearing on the State's motion to dismiss this post-conviction petition, that the petitioner had, at any

time subsequent to 1963, been restored to competence; nothing in the record indicates there was any hearing or any judicial procedure of any kind to determine whether petitioner had in fact been restored to competency.

We conclude that, in this case, our law required that petitioner be adjudged competent by a jury to stand trial before the entry of his pleas of guilty. Ill. Rev. Stat. 1969, ch. 38, par. 104-3(b), read in conjunction with paragraph 104-2(a) and (b). People ex rel Suddeth v. Rednour (1965) 33 Ill.2d 278, 211 N.E.2d 281. We note also that it has been held that proof of a prior adjudication of insanity raises a presumption that the condition continues. People v. Samman (1951), 408 Ill. 549, 97 N.E.2d 778; People ex rel Wiseman v. Nierstheimer (1948), 401 Ill. 260, 81 N.E.2d 900. Petitioner's petition, therefore, raised a substantial constitutional issue, and the trial court should have held an evidentiary hearing on the petition.

We add that we are not to be understood as holding that, in every case in which there has been a prior adjudication of insanity, there must be a subsequent restoration proceeding based upon a jury verdict of competency before a petitioner may properly be brought to trial. We are aware of People v. Barkan (1970), 45 Ill.2d 261, 259 N.E.2d 1, and People v. Richeson (1962), 24 Ill.2d 182, 181 N.E.2d 170, but those cases are readily distinguishable on their facts from the instant case, which falls squarely within the provision of Ill. Rev. Stat. 1969, ch. 38, par. 104-3(b).

The cause is reversed and remanded to the trial court for an evidentiary hearing on the petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

* DOWNING, J., did not participate.

57310

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.	)	
	)	
BRUCE SANTORO,	)	HONORABLE
	)	WALTER P. DAHL,
Petitioner-Appellant.	)	PRESIDING.

SUPPLEMENTAL OPINION ON DENIAL OF
PETITION FOR REHEARING.

PER CURIAM:*

The State's petition for a rehearing is denied.

We add that the State's petition appears to misapprehend our purpose in remanding the cause for an evidentiary hearing. We have held that the jury's determination, in the sanity hearing on September 13, 1963, that petitioner was incompetent to stand trial on Indictment 63-1114 charging the offense of rape created a bona fide doubt that petitioner was competent to stand trial on September 14, 1965 on Indictments 63-1114 and 65-1937 and to enter pleas of guilty of the offenses charged in these indictments, because, as a matter of law, petitioner was entitled to be adjudged competent by a jury to stand trial before the entry of his pleas of guilty.

Petitioner's allegation in his post-conviction petition that he had not been so adjudged competent was taken as true for purposes of the State's motion to dismiss the post-conviction petition without an evidentiary hearing. The purpose of the evidentiary hearing will be to adduce evidence as to the actual truth of that allegation so that a finding may be made in respect thereof. The allegation in part was that petitioner had been released "upon a Court order", but no such order appeared in the record before us. The warden's letter stated that petitioner had been "released to the Sheriff of Cook County", and not,

therefore, released from custody. At the hearing on the State's motion to dismiss without an evidentiary hearing, the Assistant State's Attorney stated that petitioner had been restored to competency, but the record before us contained nothing to support that statement. The evidentiary hearing to be provided will presumably adduce evidence to support a finding as to what the facts are in respect of petitioner's allegation that he had not been restored by a jury to competence to stand trial in the interim between September 13, 1963 and September 14, 1965, a procedure to which we held that he had an unwaivable constitutional and statutory right as a matter of law. Should the trial judge's finding be that petitioner had in fact not been so restored, then the trial judge must set aside the pleas of guilty to Indictments 63-1114 and 65-1937 and the convictions and sentences entered thereon, and the cases will pend trial after petitioner shall have been so restored.

* FIRST DISTRICT, SECOND DIVISION.
DOWNING, J., did not participate.

13 I.A.3 437

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 9th day of August A. D. 1973, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11742 Agenda No. 73-21

People of the State of Illinois, Plaintiff-Appellee vs. Earlie Mae Perkins, Defendant-Appellant	Appeal from Circuit Court Macon County

MR. JUSTICE TRAPP delivered the opinion of the court:

Defendant was convicted of manslaughter at her jury trial on a charge of murder. Sentence of five to ten years was imposed.

Upon appeal, defendant urges that she suffered incompetent representation in that counsel failed to press the court to grant probation or to argue background matters which would be likely to mitigate sentence. It is also urged that the trial court has an obligation to procure information leading to the imposition of an individualized sentence, but failed to do so.

Neither proposition has merit upon this record. Upon the issue of representation, we find that counsel obtained full pre-trial discovery, procured the appointment of a stenographer for witness interviews by his investigator and a substitution of judges. The trial continued over several days and counsel

participated with objections to evidence and matters of instructions to the jury. It appears that he made as much of a defense of self-defense as facts would permit. Post-trial motions were argued.

The evidence would support a conclusion of a ruthless shooting of the victim without legal justification. In addition to the evidence upon the offense, the record shows defendant's education, social and family life. Counsel did point out the absence of a criminal record and urged a one year sentence. The court's colloquy makes clear that extended argument for probation would be fruitless. Upon such facts, defendant's citations of People v. Bradford, 1 Ill.App.3d 38, 272 N.E.2d 259 and People v. Odom, 71 Ill.App.2d 480, 218 N.E.2d 116 are neither persuasive nor relevant.

As to the proposition that the trial court failed to make sufficient inquiry of the background of defendant, this record is adequate and clearly distinguishable from that in Bradford where there was a plea of guilty but no facts as to the offense appeared in the record. In stating the trial court's obligation, defendant relies upon People v. Nelson, 87 Ill.App.2d 159, 231 N.E.2d 115. The Supreme Court reversed Nelson, 41 Ill.2d 364, 231 N.E.2d 115.

This case was pending upon direct appeal on the effective date of the Unified Code of Corrections, Ill. Rev. Stat. 1972, Supp., ch. 38, para. 1001 et seq, so that there has not been a

final adjudication in the cause. People v. Chupick, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269. Upon such authorities sentence is to be imposed under the provisions of the Code. Voluntary manslaughter is a Class 2 felony. Ill. Rev. Stat. 1972, Supp., ch. 38, para. 9-2(c). The sentence upon such a felony shall be any term exceeding one year and not exceeding 20 years. Para. 1005-8-1(b)(2). The minimum term shall not be greater than one-third of the maximum. Para. 1005-8-1(c)(3).

The judgment of conviction is affirmed and the cause is remanded to the circuit court with directions to re-sentence in accordance with the provisions of the statute.

AFFIRMED AND REMANDED WITH DIRECTIONS.

CRAVEN, P.J. AND SIMKINS, J. concurs.

56807

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.	)	
	)	
CHARLES MILES,	)	HONORABLE
	)	JOHN J. MORAN,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION*):

After a bench trial, defendant was found guilty of the offense of unlawful use of a weapon and was sentenced to the House of Correction for a term of 90 days. Ill.Rev.Stat. 1969, ch. 38, par. 24-1(a)(4). We are not concerned with three other charges which had also been lodged against him, as they were either dropped or not made subject to this appeal.

Defendant contends: (1) that his conviction for unlawful use of a weapon was obtained in violation of his constitutional rights by subjecting him to double jeopardy; (2) that since neither the defendant nor his attorney indicated a jury was to be waived at the second trial for the unlawful use of a weapon, the judgment against him was erroneously entered; and (3) that the defendant was not proven guilty beyond a reasonable doubt.

Throughout the proceedings, defendant was represented by private counsel who, in answer to the court's pre-trial question as to the defendant's plea, stated: "Not guilty, jury waived, trial by this Court."

The defendant filed an oral pre-trial motion to suppress the physical evidence. After a hearing, the motion was denied.

The trial record discloses that on April 20, 1971, at about 9:15 P.M., Police Officers Curley and Brady were driving their police car near the area of Monroe and St. Louis Streets, Chicago.

---

* DRUCKER, J., did not take part.

They saw three women on the southwest corner of Monroe and St. Louis who were flagging down passing cars. Defendant was standing across the street on the southeast corner. Defendant waved his hand and the women ran away. The officers started to chase the women, gave up the chase, and then went over to defendant to question him as to what he was doing there. When defendant saw the police, he tried to walk into a basement door and at that time he took an object from his coat and threw it to the ground. Officer Curley searched defendant for any weapons that he might have hidden on his person, but did not find any. Curley then looked around the area and found a .25-caliber Titan automatic, serial number 1358053, about three feet from where defendant was standing. Counsel for the State and defendant stipulated that the gun might be received into evidence.

The officers asked defendant where he had gotten the gun, and he said he did not have a gun. Officer Curley told defendant he was under arrest and advised him of his rights. Defendant then attempted to break away from Officer Brady and started to run. However, the officers caught him about five feet away; force was used to restrain him; and he was again placed under arrest. Curley asked defendant if the gun was his and he said it was not. When the officers searched the area at the time of the arrest, there were no other guns around nor were there any other objects of any value.

On cross-examination, Curley said that the only thing he saw defendant do before the officers went in the defendant's direction was to wave to some women who were across the street. Defendant did not have any conversation with the women as he was on the opposite corner from them. The officers did not see defendant with the women.

Defendant testified that he did not have a gun in his possession on that day. He also said that when the officers placed him under arrest he did not attempt to run; that all he was doing was trying to explain to the officers that it was not his gun.

On cross-examination, defendant testified that he saw the police officers come toward him and he began to walk off the corner to go to the courtway of the building to see some people. At that time he turned around and faced the officers. He did not drop anything and did not make any motions with his hands.

The court then found defendant guilty on the charges of unlawful use of a weapon and failure to register as a gun owner; and he was found not guilty of resisting arrest and of failure to register a gun under a city ordinance.

Thereafter, the following discussion took place between the trial court and counsel:

> MR. FAGAN (assistant State's attorney): This U.U.W. charge was filed as a felony,* rather than a misdemeanor. The officer just informed me of that. We would ask to reduce it after the fact. Counsel failed to object. It's up to you.
>
> You have no objection?
>
> MR. PRICE (defendant's attorney): I have no objection.
>
> MR. FAGAN: Thank you. We would ask to strike the word "felony"--
>
> (Proceedings off the record not reported.)
>
> THE COURT: Do you waive re-execution (of the complaint) and re-swearing?
>
> MR. PRICE: I will waive re-execution, your Honor. We have put our hearing on in a fair manner. I certainly wouldn't suggest to the Court an additional hearing on the matter.
>
> MR. FAGAN: Counsel has been very fair. We will nonsuit the City charges of registration and--

---

* Carrying a concealed weapon within five years after release from a penitentiary.

THE COURT: All right, he will be discharged on the resisting.

Any previous record on Mr. Miles?

MR. FAGAN: Yes, Judge. In Nashville, Tennessee--

THE COURT: You had better file a new charge on the misdemeanor charge.

MR. FAGAN: Rather than have it re-executed?

THE COURT: Yes.

MR. FAGAN: All right, with the understanding that the proof would be identical, Counsel?

THE COURT: You stipulate the testimony would be the same on a new charge?

MR. PRICE: Yes.

MR. FAGAN: I tender to you, now, Counsel, a substituted complaint--

THE COURT: I think we had better--

MR. FAGAN: All right.

Is that your signature?

OFFICER JAMES BRADY: Yes, sir, it is.

MR. FAGAN: If I called you to testify you would testify the same in substance as your brother officer?

OFFICER JAMES BRADY: Yes, sir.

THE COURT: There will be a finding of guilty, now; on the felony charge you want to nolle that?

MR. FAGAN: Nolle.

The defendant argues that he was placed in double jeopardy when, after trial and a finding of guilty, the State filed a charge of an unlawful use of a weapon complaint for a misdemeanor. He also argues that he or his attorney did not indicate a jury was waived at the second trial. These points were not raised in the trial court and, therefore, the defendant may not now raise them in this court for the first time. People v. Morris, 6 Ill. App.3d 136, 139, 285 N.E.2d 247.

However, even if we consider these arguments, they are not sustained by the record. They are based on the supposition that a trial was held on the complaint for a misdemeanor charge of an unlawful use of a weapon. Contrary to the defendant's contention, the record clearly shows that there was not a trial after the complaint for a misdemeanor was filed. Rather, the record shows that counsel for the defendant stipulated to the filing of the complaint for the misdemeanor and the withdrawal of the felony charge (a move that was obviously to defendant's advantage); that he waived re-execution and re-swearing of the complaint for a misdemeanor, after which counsel for defendant stated, "We have put our hearing on a fair manner. I certainly wouldn't suggest to the court an additional hearing on the matter." Counsel further stipulated that the testimony on the misdemeanor charge would be the same as that introduced on the felony charge.

Under these circumstances, defendant has waived his arguments of both double jeopardy and lack of jury waiver. A defendant, by stipulation, may waive the necessity of all or part of the case which the State has alleged against him, and having done so, he cannot complain of the evidence which he has stipulated into the record. People v. Hawkins, 27 Ill.2d 339, 189 N.E.2d 252. A defendant will not be permitted to argue an alleged error where his counsel of record actually invited and affirmatively participated in a procedure which he now claims was error. People v. Morris, 6 Ill.App.3d 136, 285 N.E.2d 247. In the case at bar, the matters which defendant now claims as erroneous were stipulated to by his own privately retained counsel. The effect of this stipulation was to ratify and affirm all prior proceedings in the trial court, including the jury waiver, the filing of the complaint for a misdemeanor, and,

further, that all of the testimony presented at the hearing under the felony complaint should stand and be considered by the court as applying to the misdemeanor complaint.

In light of the foregoing, it is apparent that defendant's jury waiver under the felony complaint applies with equal force to the misdemeanor complaint. The findings of guilty by the trial court and the imposition of the sentence after the filing of the misdemeanor complaint is in full accord with the stipulation of the parties and, therefore, defendant was not placed in double jeopardy.

Defendant also argues that the evidence failed to prove, beyond a reasonable doubt, that the weapon found close to him on the ground was shown to have been concealed by him.

A similar argument was made in the case of People v. Malega, 255 Ill.App. 474. There, police officers saw the defendant walking fast on the south sidewalk of 47th Street, Chicago, going west. As the officers approached the defendant, they saw him take some dark object out of his right-hand overcoat pocket and throw it to the ground. He was searched by one of the officers to ascertain whether he carried concealed weapons, and not having found any, the officer was about to turn him loose, when he was advised by some other police officers that they had found three revolvers, one in the front of 1941 W. 47th Street and two in front of 1943 W. 47th Street. The defendant testified that he did not throw any revolvers, as stated by the police, but that he threw an empty cigarette carton; and that he was entering the premises at 1947 W. 47th Street, which was a real estate office, to get some clothes he had left there. The court held that it was proven beyond a reasonable doubt that the defendant had carried a revolver concealed upon his person, which was later found by the police officers on the street.

Likewise, in the case at bar, the police officers saw defendant take an object from his coat and throw it to the ground. The officers immediately searched the area and found a gun on the ground in close proximity to the defendant. This evidence proves beyond a reasonable doubt that the gun found on the ground was the object defendant had taken from his coat pocket and thrown to the ground; and that, therefore, defendant had concealed a weapon in his pocket.

In a bench trial, it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial judge will not be disturbed. People v. Bracey, 129 Ill.App.2d 57, 262 N.E.2d 748; People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378.

The trial court was in a better position to observe the demeanor of the witnesses during the trial and found defendant guilty of the offense of the unlawful use of a weapon in that he knowingly carried concealed on or about his person a .25-caliber Titan automatic gun. Under such circumstances, this court will not disturb the judgment of the trial court.

The cases cited by defendant are not applicable to the facts in the case at bar.

The judgment is affirmed.

A F F I R M E D.

(Publish abstract only.)

56472

AVIS PLUMBING & HEATING CONTRACTORS CORP., Plaintiff, vs. MC CORMICK THEOLOGICAL SEMINARY, GERHARDT F. MEYNE CO., and Unknown Owners, Defendants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
GERHARDT F. MEYNE CO., Counter-Plaintiff and Third Party Plaintiff, vs. AVIS PLUMBING & HEATING CONTRACTORS CORP., Counter-Defendant, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Third Party Defendant.	HONORABLE WALTER F. [illegible], Presiding.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Counter-Plaintiff and Third Party Plaintiff, vs. AVIS PLUMBING & HEATING CONTRACTORS CORP., Counter-Defendant, and WILLIAM HENNING RUBIN, Third Party Defendant.	

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

This appeal originated with a complaint by Avis Plumbing & Heating Contractors Corporation to foreclose a mechanic's lien for plumbing work done at McCormick Theological Seminary (defendant), in accordance with Avis' obligation as subcontractor to Gerhardt Meyne Company (defendant). Avis' amended complaint contained two counts, the first based on the mechanic's lien and the second for damages due to Meyne's alleged arbitrary cancelation of the contract and alleged defamatory statements concerning Avis' performance.

Meyne filed a counterclaim for damages charging that Avis breached the plumbing contract, after which Meyne hired another subcontractor who completed Avis' work. Meyne also filed a Third Party

Complaint against Avis' surety, Fidelity and Deposit Company of Maryland, on Avis' performance bond. Fidelity then filed a counterclaim against Avis and its president, William H. Rubin, requesting indemnity for any judgment against it, plus costs.

The court entered judgment against Avis and in favor of the defendants on both counts of the amended complaint and also entered judgment for the defendant Meyne on certain elements of the counterclaim. Then, the court entered judgment for Meyne and against Fidelity for part of the amount due from Avis and entered judgment for Fidelity and against Avis for the amount of the judgment against Fidelity, plus attorneys' fees. Avis, joined by Fidelity in a cross-appeal, appeals from the judgments against it on its amended complaint and on Meyne's counterclaim. Meyne cross-appeals on the ground that the damages awarded it by the trial court were inadequate. Meyne filed a motion to dismiss the appeal of Avis, and Fidelity filed a motion to dismiss the appeal of Avis from the judgment in favor of Fidelity, which motions were taken with the case.

Gerhardt Meyne Company was the general contractor awarded the contract for construction of an addition to the McCormick Theological Seminary in May 1967. Meyne subcontracted the plumbing work on the addition to Avis Plumbing & Heating Corporation on its bid of $79,650. The subcontract was signed on June 7, 1967. Prior to this date, Meyne notified Avis that it was the successful bidder for the plumbing work and suggested it could start ordering materials and preparing shop drawings. A performance bond required of Avis under its subcontract was provided by Fidelity and Deposit Company of Maryland in the contract amount, $79,650.

Dissatisfied with Avis' performance under the contract, Meyne issued a three-day notice, warning Avis that Meyne would exercise its election to cancel the contract. On September 21, 1967, Meyne

notified Avis that the contract was canceled. On September 26, 1967, Meyne negotiated a contract with L. J. Keefe Company at a cost of $88,000 for the plumbing work still to be done on the Seminary job. On January 24, 1968, Avis filed a mechanic's lien in the contract amount, $79,650.

This case presents the questions of whether the trial court properly:

1. decided in favor of Meyne and the Seminary, on both counts of Avis' complaint,

2. decided in favor of Meyne on its counterclaim, and

3. computed the damages suffered by Meyne.

Whether Avis established the value of the services and materials supplied at the site of the Seminary job and whether Meyne's cancelation of the contract was arbitrary were questions of fact to be determined by the trial court. We will not disturb the findings unless they are against the manifest weight of the evidence. (Schulenburg v. Signatrol, Inc., 37 Ill.2d 352, 226 N.E.2d 624.) As to the mechanic's lien claim, Avis presented testimony regarding the kind of work done on the jobsite and the kinds of materials delivered to the site. But there was no clear evidence of the value of the work done by its employees. The trial judge found the evidence inadequate to support Avis' claim, and we cannot say on the record that this finding was against the manifest weight of the evidence.

As to Avis' claim for damages arising from Meyne's cancelation of the contract and subsequent defamatory statements concerning the quality of Avis' work, we look first to the contract between the parties, which provides in part:

"SECOND: The Subcontractor hereby agrees to perform the work at the job site when so ordered by the Contractor.

Time shall be the essence of this contract, and the Subcontractor shall complete the several portions and the whole of the work included in this agreement in such manner, at such times and places, and in such sequence so as not to delay the general progress of the entire work and shall complete it at such time as will allow the entire work to be completed by the Contractor without delay. The Subcontractor shall be liable to the Contractor for any damages or delays caused by the Subcontractor.

* * *

NINTH: If the Subcontractor should ... at any time refuse or should fail, except in cases for which extension of time is provided, to supply properly skilled workmen or proper materials, or fail to prosecute the work with promptness and diligence, including the correction of faulty work or if he should fail to make prompt payment to others for material or labor or services under this contract, or persistently disregards laws, ordinances or the instructions of the Contractor, or otherwise be guilty of a violation of any provision of this contract, then the Contractor may without prejudice to any other right or remedy and after giving the Subcontractor three days' written notice terminate the employment of the Subcontractor and cancel this contract and take possession of the premises where the Subcontractor's work is being performed and of all materials, tools and appliances thereof and finish the work by whatever method the Contractor may deem expedient. In such case, the Subcontractor shall not be entitled to receive any further payment under this contract until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work, including compensation for additional managerial and administrative services, such excess shall be paid to the Subcontractor. If such expense shall exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor...."

Meyne had the right to cancel the Avis subcontract under certain conditions. By claiming that Meyne's cancelation was arbitrary, Avis urges that the requisite conditions for cancelation did not exist. The evidence, however, establishes that the cancelation was not arbitrary but was justified and accomplished in accordance with the terms of the contract. The plaintiff Avis had only one employee on the jobsite for most of the month of August. Repeated requests for more progress on the plumbing work were met with the excuse that men and materials were not available. Although the crew was increased for a period, the number dwindled so Meyne finally issued its three-day notice to Avis, and, receiving an unsatisfactory

response, canceled the contract. In defense Avis alleged that Meyne refused Avis' employees admission to the jobsite and generally interfered with its attempts to perform its contract obligations. This defense raises a conflict in the evidence, the resolution of which was within the trial court's province. Mortell v. Beckman, 16 Ill. 2d 209, 157 N.E.2d 63.

In addition Meyne presented testimony that it had been obliged to pay a debt of Avis to a supplier which had delivered material to the Seminary site. Under the terms of the contract, this too would justify cancelation, as would the evidence presented by Meyne to the effect that certain documents required of Avis were not produced. The record, therefore, supports the judgment in favor of the defendants and against Avis on the latter's complaint. The claim for damages due to defamatory statements was based on the wrongfulness of the cancelation; hence, that part of the complaint falls with the claim of arbitrary cancelation.

Having concluded that Meyne was justified in canceling the contract due to Avis' actions, the remaining issues have to do with the damages suffered by Meyne. The first element of these damages is the difference between the contract price with L. J. Keefe Company ($88,000) and the contract price with Avis ($79,650) or $8,350. Avis contends that Meyne was obligated to shop around for another subcontractor or was at least obligated to go to the next lowest bidder after Avis, a company called Empire Piping. Failing this, Avis and Fidelity argue that Meyne's damages should be limited to the difference between the bid of Avis and the bid of Empire. This argument ignores the express provision of the contract that Meyne could complete the plumbing work in any manner that was expedient. This is not to say that we would condone exploitation of Avis' breach, but we find no evidence of that in this case. The defendant substituted

for Avis a plumbing contractor that had already bid on the job and was willing at that date to complete the work. Prior dealings with that contractor, abrogating the need for the investigation which would be required for Empire, were additional reason for Meyne's choice of Keefe. In answer to Fidelity's claim that Avis should have been given credit for work done prior to cancelation, we note that the trial judge concluded that Keefe's price would have been higher had it not taken Avis' contribution into account in accepting the job. Besides this reason, however, the contract specifically provides for no payment to a breaching subcontractor, where the expense of completing the work exceeds the unpaid balance due the subcontractor. Finally, the contention that the non-breaching party to a contract should have mitigated damages must be proved by the one who alleges it. (Decatur Cemetery Land Co. v. Bumgarner, 7 Ill. App.3d 10, 286 N.E.2d 501.) In this case the record does not reveal evidence which would require us to reach a conclusion different from that of the trial court.

The next element of damage claimed by Meyne was for payment to one of Avis' suppliers, American Standard Company, in the amount of $1,607.29. The record supports the finding that this payment was in fact made for Avis by Meyne in satisfaction of a debt for goods delivered to the jobsite. Fidelity makes the point that it was not established at the trial that this was a bona fide debt of Avis. But it was not necessary for Meyne to show beyond a reasonable doubt that the amount it paid was Avis' obligation. Having established that the amount was billed to Avis for goods delivered to the Seminary site, and that American Standard Company filed a mechanic's lien to collect the debt, Meyne satisfied its burden of proof with respect to the existence of the obligation. Under the contract this obligation shown to have been paid by Meyne became part of the damages owed by Avis.

Another element of damages was an amount of $930 for hand excavation and removal of excavated material by Meyne. Because of Avis' delays, the underground piping was installed out of sequence. The state of construction prevented the use of machinery to perform the excavation and removal of material by the plumbing subcontractor who succeeded Avis. Hence, the work had to be performed by hand. Meyne agreed to do this work since it was not within the scope of the plumbing subcontract. The trial judge correctly found this to be an expense directly related to Avis breaching the contract with Meyne. The amount was calculated from the cost per cubic yard of handling the material. On this basis, we cannot say that the trial court erred in accepting Meyne's computation of its cost.

The next element of damages claimed is an annual bond premium demanded of Meyne by the Seminary to protect the latter from an action based on Avis' mechanic's lien. Three annual installments of $1,200 each were allowed as damages against Avis. These were, of course, directly related to Avis' breach of the subcontract and are properly recoverable by Meyne. The trial court did not, however, include the amounts in the judgment in favor of Meyne and against Fidelity. Based on the contract between Avis and Fidelity, this determination was correct.

The trial court did not allow Meyne to recover the claimed administrative and overhead costs due to Avis' breach. These consisted in large part of estimates of time spent by Mr. Bornhoeft in acquainting Keefe with the operations of the contract and of overhead allocated to the project for the additonal two months caused by Avis' delays. The record does not reveal, however, that these amounts were expended by Meyne because of Avis' breach. There is no evidence that these costs would not have been payable absent Avis' breach. And, in fact,

there is evidence that Mr. Bornhoeft is a salaried employee, whose compensation does not depend on the number of hours he works. Meyne contends that the trial judge should not have discounted Mr. Bornhoeft's testimony. We cannot agree. The trial judge properly considered this testimony and weighed it in reaching his decision. The estimates were vague and unsupported by records and the trial judge had a right to reject them.

Having carefully reviewed the record, we conclude that the judgment should be and it is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.

58453

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
JOHN CLARK,	)	HONORABLE
	)	DANIEL J. WHITE,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

John Clark, defendant, was found guilty at a bench trial of the crime of battery, in violation of Section 12-3 of the Criminal Code, and was sentenced to a term of six months in the House of Correction. (Ill. Rev. Stat. 1971, ch. 38, par. 12-3.) He appeals contending that the court improperly proceeded with regard to the criminal complaint under which he was found guilty, that the complainant in the complaint and the complaining witness at trial were not shown to be one and the same person, and that the People failed to prove him guilty beyond a reasonable doubt.

The criminal complaint filed against the defendant, as amended, reads as follows:

> Ezzie BOND complainant, now appears before The Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that John Clark has, on or about 2 May 72 at 5006 Prairie committed the offense of Battery in that he intentionally or knowingly, without legal justification made physical contact of an insulting or provoking nature ~~slept-with~~ by slapping her, the victim, Ezzie Bond. in violation of Chapter 38, Section 12-3 * * * *
>
> (Signed) Ezzie L. Bond
> 5006 S. Prairie * * * *

When the matter was called for trial, defense counsel stated to the court that a plea of not guilty would be entered and that a jury trial was waived. The court thereupon read the charge to the defendant, that he "intentionally and knowingly without legal justification made physical contact of an insulting and provoking nature in that you slapped the defendant Essie Barnes [sic]."

*Sullivan, J., took no part.

Defendant himself related to the court that he had previously spoken to his counsel, that he wished to plead not guilty to the charge, and that he also wished to waive a jury trial. Defense counsel then moved to dismiss the complaint on the ground that it alleged the "fact of sleep"; the court suggested that the complaint be amended; and the assistant State's Attorney asked leave to strike the word "sleep" and to insert the word "slap." Defense counsel thereafter stated that he had no objection to the amended complaint; the court stated that it had read the complaint to the defendant in the amended form and that it was not necessary to read it to him again; and the defendant was asked if he understood what he was charged with, that of slapping the victim, to which defendant answered in the affirmative.

Essie L. Barnes (sic) testified that on May 2, 1972, she was in her home at 5006 South Prairie Avenue in Chicago and that between 9:30 and 10:00 P.M. defendant rang the doorbell, stated that he owed the witness money, and stated he wished to pay her. Defendant and the witness sat and talked a while, the witness excused herself to go to the washroom, and when she returned the defendant was standing at the door with a knife, stating, "I am going to rape you." She replied that the defendant was "kidding," that the defendant made her disrobe, and that she "submitted to him." Defendant struck her "hard" in the chest, but she did not know whether the blow was with an open or a closed hand. Defendant threatened to kill her if she left the room. Defendant then fell asleep; she left the apartment and called the police.

On cross-examination the complaining witness testified that she had rented her apartment to the defendant about two or three years before the incident, that he had been a roomer at that time and "no more," that she had never engaged in sexual intercourse with him in the past, that she did not scream when he forced her

to submit to him that night, and that defendant was still in the apartment when the police arrived about 11:00 P.M.

A defense motion for a directed finding of not guilty on the ground that there was no slapping shown by the evidence was denied.

Defendant testified in his own behalf that he saw the complaining witness on the night in question, that the last time he saw her was in October 1969, and that he had sexual intercourse with her on several occasions in the past. On the night in question he arrived at the apartment, he and the complaining witness talked, she went to the washroom as he laid down on the bed in her bedroom, and thereafter she entered the bedroom, disrobed and laid in the bed with him. Later he fell asleep after which he was awakened by the police who took a knife from the pocket of his pants which were hanging on a chair. He denied holding a knife on the complaining witness that night and also denied striking her.

Defendant was found guilty as charged and after a hearing in aggravation and mitigation, which revealed no prior convictions, a common law wife and children in downstate Illinois, and defendant's age at 38 years, he was sentenced to serve six months in the House of Correction.

Defendant's initial contention centers around the fact that the complaint as originally filed against him charged merely that he "slept with" the complainant, that such language did not charge the criminal offense of battery, and that the court erred in failing to dismiss the original complaint and in granting the amendment. This argument overlooks the fact that defendant's trial counsel expressly stated that he had no objection to the amended complaint and that generally complaints may be amended prior to the trial where done openly and with the knowledge of

the defendant. Compare People v. DeGroot, 108 Ill. App.2d 1, 247 N.E.2d 177, with People v. Stringfield, 37 Ill. App.2d 344, 185 N.E.2d 381.

In DeGroot a traffic citation was amended in open court to supply a deficiency, the amendment was known to the defendant, and the court held the amendment to be valid. In Stringfield, on the other hand, the court held the amendment invalid where the information was amended surreptitiously after a copy of the information had been given to him without defendant's knowledge.

The complaint here, as amended, charged the defendant with battery in that he intentionally and knowingly and without legal justification slapped the complainant. The complaint is couched in the terms of the statute and is therefore valid. Ill. Rev. Stat. 1971, ch. 38, par. 12-3; People v. Grieco, 103 Ill. App.2d 108, 243 N.E.2d 417.

Defendant next contends that the complainant's name in the complaint was "Ezzie (L.) Bond" whereas the complaining witness who testified at trial is designated as "Essie L. Barnes," and that this constituted a fatal variance between the pleading and the proof. This is a clear case for the application of the rule idem sonans. The pronunciation of those two names results in practically identical sounds and it is reasonable to conclude that the court reporter mistook "Bond" for "Barnes." (People v. Lomax, 126 Ill. App.2d 156, 164-165, 262 N.E.2d 63.) Furthermore, it does not appear that defendant was in any manner prejudiced by this variance, nor did he raise this matter at trial. He admitted knowing the complaining witness, admitted going to her apartment, and admitted having sexual intercourse with her. His claim, at this late date and under these circumstances, that he was prejudiced, is frivolous. See People v. Rosario, 4 Ill. App.3d 642, 281 N.E.2d 714.

The case of People v. McCall, 42 Ill. App.2d 295, 192 N.E.2d 257, cited by defendant, is not in point; there the information filed in the old Municipal Court charged an assault upon a male person whereas the information was signed by a female person, and further, the jurat on the information form was not fully completed, as required by statute.

As to the defendant's final contention, that the People did not prove his guilt beyond a reasonable doubt, the evidence clearly shows this contention to be without merit. The complaining witness testified that defendant struck her a "hard" blow in the chest at the time of the confrontation. The fact that the complaining witness is not charging the defendant with rape, or with assault with a deadly weapon, or with any of the other offenses which might have been proved, does not, as defendant argues, raise the act of slapping "beyond any credible interpretation that such testimony justifies." The act of slapping is consistent with the other matters testified to by the complaining witness whose credibility was for the trier of fact. The trial court is not required to search out potential explanations for an act compatible with innocence and elevate them to the status of a reasonable doubt. It was the function of the trier of fact to determine the credibility of the complaining witness and the weight to be accorded her testimony, and such determination will be disturbed only where the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. We find sufficient evidence to support the conviction. People v. Hampton, 44 Ill.2d 41, 45, 253 N.E.2d 385.

The judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

Abstract only.

No. 57615

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
	)	
vs.	)	
	)	
DENNIS LUMPKIN,	)	HONORABLE
	)	RICHARD J. FITZGERALD
Defendant-Appellant.	)	PRESIDING

PER CURIAM* (First District, Fifth Division):

Defendant originally charged with the murder of Michael Berkley (Ill. Rev. Stat. 1971, ch. 38, par. 9-1(a)(1)), was subsequently indicted for voluntary manslaughter (Ill. Rev. Stat. 1969, ch. 38, par. 9-2). He entered a plea of guilty and after a hearing in aggravation and mitigation was given a sentence of not less than one nor more than three years. On appeal he contends the trial court committed reversible error in failing to comply with Supreme Court Rule 402 in accepting his plea of guilty because (1) it did not state the terms of the plea agreement in open court; (2) it did not question the defendant personally in open court to "confirm its terms"; and (3) it did not state in open court its concurrence or conditional concurrence in the plea agreement reached.

When the case was called the following colloquy occurred:

> MR. KAVANAUGH (assistant State's attorney): Dennis Lumpkin is before the Court, Judge, represented by the Public Defender.
>
> There has been a continuing conference on this matter and the State's recommendation has been conveyed to Mr. Braden, the attorney, stating what the State would recommend on a plea of guilty to the charge of voluntary manslaughter before the Court.
>
> MR. BRADEN (assistant public defender): Your Honor, what the Assistant State's Attorney, Mr. Kavanaugh, has just stated to the Court, I have communicated the offer to the defendant, the offer being one to three years.
>
> The defendant finds this offer acceptable, based on this offer, and he is desirous of changing his plea of not guilty to a plea of guilty.
>
> THE COURT: Mr. Lumpkin, your counsel advises me you wish to enter a plea of guilty to Indictment Number 71-2298, charging voluntary manslaughter, is that corrent?
>
> THE DEFENDANT: Yes, sir.

---

* Lorenz, J., took no part.

Before accepting the plea the court requested information concerning the facts in the case and the State's Attorney made a statement as to his proof, including names and addresses of witnesses. Defendant was then questioned concerning (1) whether he was entering the plea voluntarily, (2) whether any threats or coercion or "promises" were made to him in order to induce the guilty plea, (3) whether he understood the charge and that in pleading guilty he waived certain vested, constitutional rights, (a) to a trial by jury, (b) to remain silent, (c) to cross-examine witnesses with the assistance of counsel, (d) to offer evidence on his own behalf, and (e) to the presumption of innocence and the requirement that the State prove the charges contained in the indictment beyond a reasonable doubt. The court also advised defendant that on a charge of voluntary manslaughter he could be sentenced to the penitentiary for not less than one nor more than twenty years, and it then accepted defendant's plea of guilty and entered judgment. The Assistant State's Attorney then stated:

> In light of the fact that there has been a continuing conference engaged in between the Court, the State and the defense counsel in regards to the defendant's background, and the facts in this case, the State would waive further aggravation and make its recommendation which has been agreed to, of not less than one nor more than three years in the Illinois State Penitentiary.

In mitigation, defendant's counsel introduced the pathology report and the record of the preliminary hearing and the court then stated:

> In view of the matters set forth in the hearing in aggravation and mitigation, it will be the judgment of this Court that defendant be sentenced to the State Penitentiary for a period of not less than one nor more than three years.

OPINION

Defendant first contends that the trial court should, itself, have stated the terms of the plea agreement in open court.

Supreme Court Rule 402(b) provides: "In hearings on pleas of guilty, there must be substantial compliance with the following:

> (b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

Thus, Supreme Court Rule 402(b), by its terms, does not specifically require that the court, itself, must state the terms of the plea agreement, but only that the "agreement shall be stated in open court." We believe that People v. Ridley (1972), 5 Ill.App.3d 680, 284 N.E.2d 37, relied upon by defendant, is not controlling. In Ridley the defense counsel advised the court he had fully informed his client of the results of the conference, but "the terms of the plea agreement were not stated by the trial court or by defense counsel at any time in open court." Here, defendant's own counsel stated the terms of the agreement in open court and we hold that to be substantial compliance with the requirement of Rule 402(b).

Defendant next contends that the trial judge was also required by Rule 402(b) to "confirm the terms of the plea agreement." After the terms of the agreement had been stated in open court, defendant was questioned at length by the court who verified that his plea was voluntary and that there were no "threats or coercion or promises" made in order to induce the plea of guilty. The record also discloses that the State in open court waived further hearing in aggravation and recommended a sentence of from one to three years which, after a short statement in mitigation, was the sentence imposed.

Rule 402(b) requires that the court, by questioning defendant, should personally confirm the terms of the plea

agreement and, although here the court did not specifically confirm with defendant that the agreement called for a sentence of from one to three years, the terms of the agreement were stated in open court in defendant's presence by his attorney and by the State and extensive questioning by the court indicates defendant was fully aware of the proceedings and entered the plea voluntarily and understandingly which, we believe, was in sufficient compliance with the requirement of Boykin v. Alabama (1969), 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709, and with Rule 402(b).

Finally, defendant argues that the trial court should have stated in open court its concurrence or conditional concurrence in the plea agreement reached in the present case.

Supreme Court Rule 402(d), upon which defendant relies, provides in part:

> (2) If a tentative plea agreement has been reached by the parties * * * the trial judge may permit, upon request of the parties, the disclosure to him of the tentative agreement * * *. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representations made to him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. (Emphasis added.)

Here, no request was made of the court to indicate its concurrence and we note that the last sentence of this Rule requires a statement in open court only "if" the judge has "indicated his concurrence." We believe, therefore, that no concurrence statement was required. Moreover, it would appear that Rule 402(d) requires such a statement in open court to assure that the court will comply with its part in the agreement and impose sentence in accord therewith. Here the court did impose the sentence agreed upon.

For the reasons stated, we conclude there was substantial compliance with the requirements of Supreme Court Rule 402 and we affirm the judgment of the circuit court.

AFFIRMED

(Abstract Only)

56615

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
RONALD RUSSELL,	)	Hon. Arthur V. Zelezinski,
	)	Presiding.
Defendant-Appellant.	)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Ronald Russell, defendant, was charged with the offense of attempt to obtain a drug by fraud and deceit (Ill.Rev.Stat. 1969, ch.111-1/2, par.802(d).) Following a bench trial, he was found guilty and sentenced to nine months in the House of Correction. He appeals, contending that the complaint fails to state an offense because it omits the words "stimulant" or "depressant".

On August 5, 1971, defendant presented a prescription at the Devon Medical Center, 2459 West Devon Avenue, Chicago, Illinois. Maurice Gordon was the registered pharmacist there. The prescription purported to be issued to Lenore Wales for Process 90 tablets of redalin, 20 milligrams, and signed by Dr. A. Nichalos. Mr. Gordon called Dr. Nichalos, who stated he had never heard of Lenore Wales and did not write prescriptions for that drug. Mr. Gordon called the police and defendant was arrested. Dr. Nichalos testified that the signature on the prescription was not his and Lenore Wales was not his patient.

The complaint states:

> "Ronald Russell has, on or about 5 Aug 1971 at 2459 W. Devon committed the offense of Attempt to obtain a drug by fraud and deciet [sic] in that he did then and there

> unlawfully attempt to obtain a, and dangerous drug by misrepresenting himself/herself without proper authority at , contrary to the provision of the Illinois Drug Abuse Control Act of the State of Illinois, in violation of Chapter 111 1/2 Section 802(d) Illinois Revised Statute***."

In People v. Coagan, 1 Ill.App.3d 437, 274 N.E.2d 494, the court described the purpose of the Drug Abuse Control Act. It said at page 441:

> "It is apparent that the legislature, in enacting the Drug Abuse Control Act, intended to control the distribution of dangerous drugs so that they are only distributed or sold by authorized persons acting in the authorized course of their employment, and to persons presenting a valid prescription."

Section 111-3 of the Code of Criminal Procedure (Ill.Rev. Stat. 1969, ch.38, par.111-3) sets out the requisites of a criminal charge. The charge "***must be such as to inform the accused of the nature of the charge, thus allowing him to prepare a defense and to serve as a bar to a future prosecution for the same offense." (People v. Harvey, 53 Ill.2d 585, 588, 294 N.E.2d 269.) A charge "***which is phrased in terms of the statutory offense may be valid if the words 'so far particularize the offense that by their use alone an accused is apprised with reasonable certainty of the precise offense with which he or she is charged.' People v. Patrick, 38 Ill. 2d 255, 258." (People v. Harvey, 53 Ill.2d 585, 588, 294 N.E. 2d 269.) "Niceties and strictness of pleading are supported only where a defendant would be otherwise surprised at trial or be unable to meet the charge or to prepare his defense." People v. Greenwood, 115 Ill.App.2d 167, 172, 253 N.E.2d 72.

The charge here refers to Section 2(d) of the Drug Abuse Control Act (Ill.Rev.Stat. 1969, ch.111 1/2, par.802(d).) That section states:

"§802. Prohibited acts

The following acts and the causing thereof are prohibited:

* * *

(d) Obtaining a drug in violation of Section 7(d)."

Section 7(d) of that Act (Ill.Rev.Stat. 1969, ch.111 1/2, par. 807(d)) states:

"§807. Manufacture, etc. of depressant or stimulant drugs - Prohibition - Exceptions - Records - Inspections

* * *

(d) No person other than a person described in Section 7(a)(7) shall obtain or attempt to obtain a depressant or stimulant drug by (1) fraud, deceit, misrepresentation or subterfuge; *** (3) the use of a forged or altered prescription; or (4) the use of a false name or a false address on a prescription."

The complaint here states that defendant committed the offense of attempt to obtain a drug by fraud and deceit in that he did unlawfully attempt to obtain a dangerous drug, contrary to the provision of the Illinois Drug Abuse Control Act in violation of chapter 111 1/2, par.802(d).

Here, a reading of the complaint (attempt to obtain a drug by fraud and deceit, contrary to the provision of the Illinois Drug Abuse Control Act in violation of chapter 111 1/2, par. 802(d)) and of par.802(d) and par.807(d) (to which par.802(d) makes explicit reference) clearly indicates the crime with which the defendant was charged.

The statute uses the words "depressant or stimulant" to describe the drugs. The statute includes rather technical and complicated definitions of the two categories. (Ill.Rev.Stat. 1969, ch.111 1/2, par.801(f).) The single word "dangerous", used in the complaint, would seem to be, at least for lay persons, a reasonable and inclusive definition of both types of drugs.

Use of this word in the complaint eliminates the need for pleading the disjunctive phrase appearing in the statute (People v. Heard, 47 Ill.2d 501, 504, 266 N.E.2d 340) as well as the need for lengthy chemical analysis of the questioned substance before filing the complaint. We note also that the descriptive word "dangerous" is used in the statute and even in its title, "Dangerous Drug Abuse Act." Ill.Rev. Stat. 1971, ch.111 1/2, par.120.3-2.

A complaint is to be read as a whole and it is settled law that the statute and the charge are to be read together and that, when so read, if they clearly indicate the crime charged, the charge is sufficient. People v. Greenwood, 115 Ill.App.2d 167, 170-171, 253 N.E.2d 72.

It is clear from the record that defendant's counsel knew the offense with which the defendant was charged and was in no way hampered in the preparation of his defense. Further, at trial he did not question the sufficiency of the indictment.

The defendant knew the offense of which he was charged. The complaint was sufficient.

JUDGMENT AFFIRMED.

*Mr. Presiding Justice Joseph Burke did not participate.

57876

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
Respondent-Appellee,	)	
vs.	)	
LAWRENCE GOODWIN,	)	HONORABLE FRANCIS T. DELANEY, Presiding.
Petitioner-Appellant.	)	

PER CURIAM:

Lawrence Goodwin [petitioner] appeals from the trial court's dismissal of his pro se petition under the Illinois Post-Conviction Hearing Act. Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.

After a jury trial petitioner was convicted of armed robbery and sentenced to a term of 15 to 25 years. He appealed, and this court affirmed his conviction. People v. Goodwin (No. 56719, decided May 15, 1973), ____ Ill. App. 3d___, ____N. E. 2d____. On August 30, 1971, while his direct appeal was pending, petitioner filed a pro se post-conviction petition, alleging that his constitutional rights were violated in that

1) the trial judge improperly denied his motion for a substitution of judges without holding a hearing;

2) the trial judge improperly denied him a continuance to allow his trial counsel to adequately prepare a defense; and

3) he was never provided with a free transcript and common law record for purposes of his direct appeal as ordered by the trial court.

On January 31, 1971, the State's motion to dismiss the petitioner's pro se petition was granted.

Petitioner appealed from the dismissal of his post-conviction petition, and the public defender of Cook County was appointed to represent him. After examining the record, the public defender filed a petition in this court for leave to withdraw as appellate counsel, pursuant to the requirements set out in Anders v. California, 386 U. S. 738. A brief in support of the petition has also been filed which states, in effect, that an appeal in this case would be wholly frivolous. On January 8, 1973, a copy of the motion and brief was mailed to petitioner and he was informed that he could file any additional points he might choose in support of his appeal before July 2,1973. He has not responded.

The petition and brief of the public defender allege that the only possible basis for an appeal would be the question of whether petitioner's pro se post-conviction petition was properly dismissed without an evidentiary hearing. In his petition, petitioner alleged three violations of his constitutional rights. His first allegation is that the trial judge improperly denied his motion for substitution of judges on May 5, 1969, without holding a hearing. The record shows that the defendant had previously been granted a substitution of judges on December 18, 1968. The record of proceedings of May 5, 1969, demonstrates that after petitioner requested a substitution of judges he was asked by the trial court on what grounds he based his belief that the court was prejudiced. He replied he believed it was because he was a Negro, and that he thought a $100,000 bond which had been set on a Negro co-defendant in the case was unreasonable. Petitioner stated that there were other reasons but they had slipped his mind. The record indicates that petitioner was afforded an opportunity to present evidence in support of his motion for substitution of judges. People v. Wolfe,

124 Ill. App. 2d 349, 260 N. E. 2d 424. The trial judge did not abuse his discretion in denying petitioner's motion for substitution of judges.

The second allegation in petitioner's pro se post-conviction petition is that he was improperly denied a continuance for the purpose of enabling his counsel to prepare for a hearing on a motion for discharge, which petitioner had filed pro se just before the hearing on his motion for substitution of judges, of which pro se motion for discharge his counsel had had no prior knowledge. At the hearing on the State's motion to dismiss the post-conviction petition, petitioner's counsel stated that he had personally talked to the petitioner, had completely reviewed the trial transcript, and had talked to the defense trial attorney. He then stated that he could find nothing in the record or in his conversations which would substantiate petitioner's contentions. Petitioner's allegation amounted to a mere conclusion which was insufficient to require a hearing under the Post-Conviction Hearing Act. People v. Smith, 40 Ill. 2d 562, 241 N. E. 2d 413.

Petitioner's third allegation in his petition is that he was not given a transcript and common law record of the trial court's proceedings for purposes of his direct appeal. This allegation is contradicted by the transcript of the hearing on the State's motion to dismiss the post-conviction petition where petitioner's counsel stated that he had a copy of the common law record and transcript. Further, the brief filed in petitioner's direct appeal, which was affirmed by this court, demonstrated that a complete trial transcript had been supplied to him. People v. Goodwin (No. 56719, decided May 15, 1973), ___Ill.App. 3d____, ____N.E. 2d ____.

We have examined the record, and we concur in the opinion of the public defender that none of the arguments raised has substantial merit. Our examination of the record does not disclose any additional grounds for appeal which are not frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel for the petitioner on appeal, and the judgment is affirmed.

Motion allowed;
judgment affirmed.

SECOND DIVISION.

Mr. Presiding Justice Stamos did not participate.

56989

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.	)	
	)	
PETER W. BLANKS,	)	HONORABLE
	)	KENNETH R. WENDT,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION*):

After a bench trial, defendant was convicted of armed robbery and sentenced to a term of not less than two nor more than six years. Ill.Rev.Stat. 1969, ch. 38, par. 18-2.

On appeal, he raises the following points: (1) the State's failure to present the only other available eyewitness raises an inference that if "allowed to testify" she would testify favorably to the defendant; (2) defendant was prejudiced by the introduction of evidence relating to prior offenses; (3) it was reversible error to admit the "hearsay" testimony of the arresting officer and the complaining witness' mother concerning the complaining witness' pre-trial identification of defendant; (4) defendant was not proved guilty beyond a reasonable doubt because the complainant's identification of defendant was vague, doubtful and conflicting.

EVIDENCE

Barbara King, for the State:

She was 15 years old at the time of trial. On February 26, 1971, she went with her 10-year-old sister, Renee, to the currency exchange a little after 5:00 P.M. It "wasn't exactly dark; it was getting dark, but it was still sort of light outside" and there were artificial lights on the street. Her mother had given her $60 to get food stamps. On the way home,

---

* DRUCKER, P.J., did not participate.

a man she identified as defendant came up behind her and told her to give him everything she had or he would shoot her. He grabbed her right arm and she turned around and looked in his face and also saw a gun which she described as black with white at the end of the handle. Defendant took $81 in food stamps and $2.50 in change from her right jacket pocket and ran through a nearby gangway. She then ran home and told her mother and a policeman who came to the house what had occurred, describing the robber as being "tall *** light complexioned *** had a natural, but it wasn't a fix *** was sort of messed up like *** bell bottoms gray and blue, and a short, brown corduroy jacket." The next day she again saw defendant and ran home and told her mother. The next time she saw defendant--the day he was arrested--he was at the cab stand on 15th Street. She told a man there that defendant was the man who had robbed her. She thought defendant was "going to come to me" so she and her sister ran home and her mother called the police. She and her mother rode with Officer Glenke around the block until they saw defendant, and she pointed him out to the policeman who arrested defendant. On cross-examination, she said that defendant did not search Renee or ask Renee to give him anything, and denied she ever told defendant's father that she did not see a weapon or that defendant had his hands in his pockets. She remembered that when previously asked if defendant had a knife or a gun, she had said positively that he had a gun. She corrected some earlier testimony to the effect that the defendant had asked her to take her clothes off, by saying defendant had not said this; and clarified her testimony at the preliminary hearing that defendant was thumbing through the food stamps and observing them, by saying that he could look through the stamps with a gun in his hands. She also confirmed some earlier testimony that defendant had a mustache.

Rosemary King, for the State:

She sent her daughter, Barbara, to get food stamps on February 26, 1971, and gave her $50 in cash. For $52 you get a $28 bonus in food stamps. She was in the car when her daughter pointed out defendant and he was arrested. At the station defendant, who was sitting in a chair crying, called to her and said: "Mrs. King, whatever happened to your daughter, I am very sorry. Will you accept my apologies?" However, he did not say that "he did it." Barbara went to the currency exchange with her daughter, Renee, age 10, but the police officers didn't ask the smaller girl many questions.

John Shields, Chicago police officer, for the State:

On February 26, 1971, at about 6:05 P.M., in answer to a robbery assignment, he spoke to Mrs. King and her daughter, Barbara. Barbara told him that defendant resembled the witness' partner, who is about 5'11", weight 165-170 pounds, 21 or 23 years old; that defendant was light-skinned, had a mustache, natural hair style, wore a brown corduroy jacket and blue-gray bell bottoms. The witness recorded the description in his report and refreshed his recollection from the report before testifying. She said that she was walking from the currency exchange when defendant said, "Give me all you've got"; that he had a small caliber revolver, but she didn't know exactly what kind it was; and that he took $80 worth of stamps from her. He did not remember her telling him she was with her sister, Renee, but his report did not say that she was alone.

James Glenke, Chicago police officer, for the State:

In March of 1971 he was assigned by radio dispatch to go to the King home, and Barbara and her mother accompanied him in a marked squad car to a nearby cab stand, where they observed defendant and another person. Barbara stated, "There is the man that held me up," and after asking her again to be sure she was

completely positive, he then stopped the defendant and told him he was under arrest for armed robbery.

Donald W. Blanks, for the defendant:

He is defendant's father and his son was living at home with him. Between 4:30 and 4:45 P.M. on the day in question, defendant was at home, which is 10 or 11 miles from the King home and it would take 45 minutes to get there on public transportation. After learning of his son's arrest, he went to the King home and spoke with Barbara King, who said $80 worth of food stamps and $3 in currency had been taken. She "thought" that the offender "had a weapon in his pocket" but "didn't actually see it." He was not informed that Renee King, a 10-year-old child, was also present. His son had a friend who lived "not too far" from the King home. The following colloquy also occurred during cross-examination:

> MR. KLAPMAN (Ass't State's Attorney):
> Q. Okay. You love your son?
>
> MR. BLANKS: A. Yes, I do.
>
> Q. You trust your son?
>
> A. Yes, I trust him.
>
> Q. Well then, Dad, why did you make him sign a contract if you trust him?
>
> A. Why?
>
> Q. Yes, for bail?
>
> A. I wanted him to live up to the contract, that's why.
>
> Q. Wouldn't he live up to it because you are his dad?
>
> A. Well, if you don't specifically state to a youngster, then they are going to deviate.
>
> Q. Did you know your son used cocaine?
>
> A. No, I didn't.

Peter Blanks, the defendant, on his own behalf:

He told Mrs. King he was sorry about what happened to her daughter but that he didn't know anything about it and she had

the wrong man. On cross-examination, he stated he was crying at the police station. On February 27, a Saturday, he arose and ate breakfast and went to the west side. He remembered that particular day because Barbara King had seen him and mentioned that he was the man who robbed her. He did not run away and did not run away again subsequently when Barbara King saw him around the cab stand and said, "That's the man that robbed me." Over objection, he was also questioned about whether on June 9, 1971, he had appeared before Judge Power on a bond forfeiture matter. Also over objection, he was questioned about whether his father trusted him "to the extent that he makes you sign a contract for putting up the bail." The court struck the word "makes." On February 26 he got up, went to school, came back home, and ate and went out, and came home and went to sleep. He was not home every night for dinner, but he was home on February 26, 1971.

Rosemary King, for the State in rebuttal:

Defendant did not mention to her that he was sorry, that she had the wrong man.

OPINION

Defendant first contends that the State's failure to call Renee King raises an inference against the State that if Renee King were to testify, her testimony would contradict that of her sister, the complainant. However, absent unusual circumstances, "[t]he State is not obligated to produce every witness to a crime and the failure to produce a witness does not give rise to a presumption that the testimony of that witness would be unfavorable to the prosecution." People v. Jones, 30 Ill.2d 186, 190, 195 N.E.2d 698, 700; People v. Boyce, 113 Ill.App.2d 266, 274, 252 N.E.2d 71.

Defendant next objects to several remarks made by the prosecutor in cross-examining defendant's father; specifically, a reference to whether the witness knew his son used "cocaine."

People v. Battle, 24 Ill.2d 592, 182 N.E.2d 713, cited by defendant, involved a jury trial in which the jury also set the penalty. The Supreme Court reversed a conviction because of the repeated introduction of evidence of defendant's sale of narcotics in a trial for murder. In the case at bar, we believe beyond a reasonable doubt that defendant was not prejudiced to the point that the experienced trial judge was influenced to make a guilty finding on that account. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824.

Defendant also complains that in cross-examining defendant, the prosecutor elicited the fact that on June 9, 1971, defendant had appeared before Judge Power on a bond forfeiture matter. Here, again, we believe beyond a reasonable doubt that this action of the prosecutor, though improper, did not affect the judge's decision in the light of the strong State's evidence of defendant's guilt.

Defendant next contends that it was error to permit the police officer and the complainant's mother to testify that the complainant identified defendant, citing People v. Wright, 65 Ill.App.2d 23, 30, 212 N.E.2d 126. In the later case of People v. Keller, 128 Ill.App.2d 401, 407-409, 263 N.E.2d 127, however, a detective was allowed to testify, over objection, that the complaining witness had identified the defendant as the "subject that held the gun on him and robbed him." The court discussed the matter of hearsay at some length, reviewed the cases and other authorities, and came to the conclusion that the statement in question was not hearsay because the source of the out-of-court assertion was present in court and subject to cross-examination. Justice Schwartz quoted Wigmore as having characterized decisions which held such evidence to be hearsay as a "telling illustration of the power of a technical rule of thumb to paralyze the judicial nerves of natural reasoning." In the case before us, the out-of-court declarant (Barbara King) was present in court and was

subjected to cross-examination. The statements complained about, consequently, were not "inadmissible as hearsay."

Finally, defendant points to various alleged inconsistencies between Barbara King's testimony at the trial, before the Grand Jury, and at the preliminary hearing; claims that her description was vague; that defendant's father corroborated his son's alibi; and that the complainant expressed some uncertainty (before the Grand Jury) as to whether defendant was in possession of a knife or a revolver. However, positive identification by a single witness is sufficient to convict. People v. Robinson, 30 Ill.2d 437, 440, 197 N.E.2d 45. At trial, Barbara King told a coherent story and made a positive identification. At most, the issue was one of credibility to be determined by the trial judge who heard the evidence and saw the witnesses. It is the function of the trier of the facts to determine the credibility of witnesses and its finding of guilty will be disturbed only where the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. People v. Hampton, 44 Ill.2d 41, 45, 253 N.E.2d 385.

The judgment of the circuit court is affirmed.

A F F I R M E D.

(Publish abstract only.)

54812

LUSTRE PRODUCTS CORPORATION, a corporation, Plaintiff-Appellee	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	)	
FRANK DeMICHEL, d/b/a F. DeMICHEL COMPANY and JACK RUKIN, d/b/a MIRROR GLAZE DISTRIBUTORS, Defendants,	)	HONORABLE NORMAN C. BARRY, JOHN J. LUPE, and SAMUEL B. EPSTEIN, PRESIDING.
JACK RUKIN, d/b/a MIRROR GLAZE DISTRIBUTORS, Defendant-Appellant.	)	

MR. JUSTICE ENGLISH delivered the opinion of the court:

This appeal is based upon a notice of appeal from an order of December 1, 1969, finding defendant Rukin in contempt of court for having violated an injunction, and purporting to appeal from four other orders which had been entered between August 2, 1957, and June 10, 1968. Plaintiff's initial complaint, filed on April 23, 1957, sued for injunctive relief against the two defendants, alleging that on March 15, 1957, defendant DeMichel had entered into a contract with plaintiff whereby DeMichel would manufacture his product, the Demco Polishing Disc and Demco Cushion Back-up Plate, exclusively for plaintiff, and that DeMichel had breached that contract by delivering said product to co-defendant Rukin, who had full knowledge of the exclusive contract.

On April 30, 1957, a preliminary injunction was issued; Rukin did not plead to the complaint; and on August 2, 1957, the court (Judge Epstein) found Rukin in default, and entered a confessed judgment in favor of plaintiff as against Rukin, permanently enjoining him from directly or indirectly: (1) selling, buying, or distributing between himself and DeMichel, or to any person other than plaintiff, those products known as Demco Polishing Pads, Demco Back-up plates, convertors, nuts, or any parts relating to said products; (2) manufacturing, delivering, or dealing in the aforementioned products or their component parts;

(3) receiving from the manufacturers, Peerless Rubber Company and Mayfair Molded Products Company, any of the aforementioned products, their component parts, or from using those molds used in the manufacture of the rubber pieces that are part of the backing plate and pads identified by the trade name Demco, presently in the hands of the manufacturing companies; and (4) engaging in any conduct similar to the acts and practices above stated.

On September 30, 1957, the court found that DeMichel had violated the terms of his agreement with plaintiff by selling and delivering the products involved to Rukin who "with knowledge, wilfully contributed to the violation of said agreement by purchasing and accepting the products involved." The court (Judge Barry) then permanently enjoined DeMichel in language similar to that used in the permanent injunction against Rukin.

On January 19, 1967, plaintiff filed a Petition for Rule to Show Cause why Rukin should not be held in contempt, alleging that Rukin had violated the permanent injunction against him by attempting to sell the products involved to someone other than plaintiff, "to-wit: American Impacts Corporation or Edward Heck."

On June 6, 1967, the court began to hear testimony, the hearings continuing until October 7, 1969. During these intermittent court proceedings, the following testimony was heard:

Jack Rukin, under Section 60 of the Civil Practice Act, for the plaintiff and later in his own behalf:

At the time he first met DeMichel in February or March, 1956, he was selling polishes and other automobile reconditioning materials for the Mirror Bright Polish Company. DeMichel, doing business as the F. DeMichel Company, was manufacturing an automobile polishing pad called the Demco Polishing Disc and Demco Cushion Back-up Pad. The original polishing disk was made of lamb's wool

which was sewn onto a fabric piece and then glued onto a molded rubber backing. The back-up plate is a piece of sponge rubber facing adhered to a hard rubber back with a metal hub in the middle. The rubber back-up plate is flexible except for a narrow circle around the hub where a metal disk lies between the two pieces of rubber. The hard rubber side of the back-up plate fits against the rubber backing of the polishing disk to form the completed polishing pad.

During the summer of 1956, DeMichel asked Rukin if he would distribute the Demco pad and he agreed, but he had DeMichel use manufactured wool instead of lamb's wool on the polishing disk. He continued doing business with DeMichel until January or February, 1957, just prior to the issuance of the injunction, unaware that DeMichel had entered into an exclusive contract for the distribution of the Demco pad with plaintiff. He never received or offered for sale any Demco product after the injunction was issued.

In the summer of 1956, he began operating under the name Ni-Kur Company in order to manufacture and distribute polishes and automatic polishing equipment, one item being a polishing pad which he called the Demcor pad. He chose that name because he thought it would be favorably associated with a well-known Amcor pad which was no longer being distributed under that name. He never registered the name of Demcor. He never used the name Demco, and never received any advice or any molds from DeMichel relating to the manufacture of the Demco pad.

During the first months of production, he was cutting his own sponge rubber pieces and completing the back-up plate by using component parts bought from DeMichel. A short time later, he decided to have all the component parts of the product manufactured specifically for him. In the latter part of 1956, he ordered a mold for the rubber backing of the polishing disk from the Perfection Mold Company, and in December, 1956, or January,

1957, he brought one of his sponge rubber parts to the Stanley Holmes Company and spoke with Mr. Holmes about having a mold made which would form that rubber piece. Holmes told him that the mold would be a simple one and that no drawing was necessary. Therefore, Rukin did not submit a design for the mold, but assumed that someone at the Holmes Company had subsequently made a drawing to work from.

In February, 1957, he called Holmes to find out about the progress on the mold, and Holmes told him that the mold was ready, but that he would have to go to the Peerless Rubber Company, where the mold was in operation, to inspect it. He did not inspect the mold, but ordered a few pieces to be made from it, and being satisfied with the pieces, purchased the mold from Holmes in March, 1957, for $295. Peerless Rubber retained possession of the mold and continued to make the sponge rubber pieces for him. He had some difficulty with that company, however, and in March, 1957, he had to sign a complaint against Peerless to force it to release the mold to him. He delivered the mold to the Judson Rubber Company which then manufactured the sponge rubber pieces for him. (He could not remember whether Peerless made the sponge rubber parts for him after the injunction was issued.) He was not aware that DeMichel had previously ordered that particular mold from Holmes or that plaintiff had ordered a duplicate of that mold in September, 1957. He could not account for the fact that his invoice for the mold bore the same number, date, and description as DeMichel's invoice, the only differences being the difference in names and the "paid" notation on Rukin's copy.

He manufactured the Demcor disk and back-up plate until May 7, 1965, at which time he sold the manufacturing equipment necessary to produce the Demcor product, including the mold which he had bought from the Stanley Holmes Company, to Ed Heck, sole owner of the American Impacts Corporation. Under that contract, Rukin retained exclusive sales and distribution rights to the product, then

called the Superama pad, for the Cook County area for 10 years. As of the time of the hearings, he was distributing the Superama pad in the Cook County area.

He examined both the Demco and the Demcor products and admitted that there were not many differences between them, those differences being: (1) the rubber backing for the polishing disk on the Demcor product bore no lettering, but had three depressions on its back, whereas the corresponding rubber piece of the Demco pad had no indentations but did bear two raised lines and raised lettering which read, "DEMCO-POLISHING-DISC. MFD. BY THE F. DE MICHEL CO. CHICAGO U.S.A. PAT. PEND." He explained that the depressions created a vacuum between the polishing pad and the back-up plate which would hold the two parts more securely in place; (2) the hub of the Demcor back-up plate is riveted to the plate, whereas the hub of the Demco plate pulls right out; and (3) the small metal disk between the two pieces of rubber in the Demcor plate will not break, as has happened with the Demco plate.

However, once the back-up plate is affixed to the polishing disk (with the identifying markings concealed between them), the products are identical, and one cannot tell whether the manufacturer was plaintiff or American Impacts Corporation.

He could not tell whether the sponge rubber pieces of the Demco and the Demcor back-up plates had been made from the same mold, although both had been made by the Peerless Rubber Company.

Harvey Steadman, for the plaintiff and under Section 60 for defendant Rukin:

At the time of the trial, he was vice-president of plaintiff corporation, a Michigan corporation never licensed to do business in Illinois. In the latter part of 1956, as secretary-treasurer of plaintiff corporation, he entered into a contract with DeMichel for the manufacture of the Demco Polishing Disc and Cushion Back-up Plate.

On March 15, 1957, plaintiff entered into an exclusive contract with DeMichel whereby DeMichel would manufacture the Demco product exclusively for plaintiff, and plaintiff would engage in an advertising campaign to sell and distribute the product. Under this contract, DeMichel was still the owner of the molds necessary to produce the rubber pieces and had the exclusive right to manufacture the Demco products. However, because DeMichel could not afford to pay for raw materials, plaintiff paid directly those companies which supplied the materials, the Peerless Rubber Company and the Mayfair Molded Products Company, and had them delivered to DeMichel, who then manufactured the pads and received payment from plaintiff for the finished products. Since 1956, when plaintiff first became aware of the Demco product, Mayfair and Peerless have each been in possession of one of the molds necessary for the production of the rubber back-up plates even though DeMichel (and subsequently plaintiff) have been the actual owners of such molds. As far as the witness knew, neither company had ever molded rubber pieces from these molds for anyone other than plaintiff.

On August 31, 1957, plaintiff ordered a duplicate of the mold for the sponge rubber piece from the Stanley Holmes Company (which had originally been ordered by DeMichel on October 9, 1956) to replace the mold which Peerless had been forced to release to Rukin.

On December 26, 1957, plaintiff acquired from DeMichel, by a written bill of sale, the molds and the manufacturing and distribution rights to the Demco products for a period of 20 years. Plaintiff did not receive physical delivery of the molds, only a written delivery, as the molds were retained by Mayfair and Peerless. However, plaintiff informed those companies that as of December 26, 1957, it was the sole owner of such molds. The molds were never changed, and those molded pieces which had previously been imprinted with the Demco name continued to be.

Plaintiff continued to supply DeMichel with raw materials, but instead of paying DeMichel for the finished products, as per the prior manufacturing agreement, plaintiff compensated DeMichel for staying on to handle the manufacturing. Plaintiff had a contract with DeMichel, renewable each December, whereby DeMichel would be the sole manufacturer of the Demco products. Renewal notices were sent to DeMichel at his last-known address every year until 1961 even though he disappeared sometime in 1960 or 1961. After that time, plaintiff had the rubber pieces molded in Chicago and then sent to the Pit-Bar Manufacturing Company in California to have the pads assembled.

Plaintiff sold the Demco products under several names, Demco, Safe-T-Edge Contour Polishing Disk and Back-up Cushion, Sav-on, and Super-Sheen, having obtained a registered trademark for the name Safe-T-Edge. Plaintiff never applied for a registration of the names Demco or Demcor with the federal or any state government. As of the time of the hearings, plaintiff no longer used the names Demco or Safe-T-Edge, but was still distributing the product in Illinois. Plaintiff applied to the Department of Commerce for copies of the patents issued to DeMichel with regard to the product involved and received copies of two patents issued (which were never assigned to plaintiff), but could get no information as to any possible patent pending.

The only other manufacturer of a pad similar to the Demco pad was Rukin. Other firms made polishing pads of wool sewn into a cloth back, but only the Demco pad (and subsequently the Demcor pad) were molded to a rubber back-up plate.

In the latter part of 1957, after the injunction had been issued, the witness found a gas station selling the product under the Demco name, but plaintiff had never sold its product to that station.

He could not testify as to when Rukin last sold the products involved to American Impacts Corporation. As of the time of the hearings, plaintiff was aware that American Impacts had been selling a buffing pad under the name of Superama (after having bought the molds from Rukin in 1965) for about one year.

The witness examined both the Demco and the Demcor polishing disks and noted that except for the three indentations in the molded rubber of the Demcor pad and the raised lettering on the Demco pad, the two were identical. One could not discern the manufacturer of the product once it was attached to a buffer because the wool of the polishing disks was also similar. However, if the buffer were running, the differences would show up because the Demcor T-nut would not be in the proper position to hold the fabric, and the buffer would spin faster than the pad. The Demcor pad fit on the Demco back-up plate (and the Demco pad fit the Demcor back-up plate) with no problem.

To his knowledge, Rukin was never an employee of either DeMichel or plaintiff corporation.

Carl Knoerschild, for defendant Rukin:

He manufactures polishing buffs, bonnets, and disks through the Milwaukee Tanning Company. His company does not manufacture contour pads, only flat pads, and when he first dealt with Rukin, there was no discussion concerning the possibility of his manufacturing a contour-edged pad. He sold these flat pads to Rukin from about 1958 to 1966. The pads were made by a patented process whereby the wool was not sewn to the canvas back, but attached through vulcanization (bringing the two materials together under pressure and heat). Although his company also made sewn pads, he never sold a sewn pad to Rukin. He began selling the vulcanized pads to the American Impacts Corporation in 1964. He never manufactured a vulcanized pad for DeMichel or plaintiff corporation. The pads, as sold to Rukin and American Impacts, did not contain a rubber

backing, and his company had nothing to do with any subsequent attachment of the pad to a rubber back. He never had in his possession a mold for the formation of a rubber back such as is used on the Demcor pad.

He examined the Demcor polishing disk, and said that his patented process had been used to adhere the wool to the fabric of the disk. He then examined the Demco disk, and said that the wool had been sewn to the fabric.

William A. Snow, for defendant Rukin:

He is a patent lawyer. At the request of Rukin's attorney, he conducted a search with regard to buffing pads and back-up plates, including their component parts. He was supplied with exact copies of both plaintiff's and Rukin's products to aid him in his search. He was also to search for any patents which had been issued to DeMichel.

He found three patents issued to DeMichel, none of which related to the polishing pad in question. In his opinion, the Demco pad, as originally manufactured by DeMichel, is not patentable in view of the state of the art in the patent office in the field.

Nobody has access to information concerning patents pending in the U.S. Patent Office, and, therefore, he could find no information to help clarify the notation on the Demco pad, " *** PAT. PEND." However, in 1956, it would have taken approximately two to two and a half years for the patent office to act on an application for a patent, and the Demco product has borne this notation for at least 10 years.

He examined both the Demcor and the Demco pads and found that the hub of the Demcor pad appeared to be molded or pressed into the rubber back-up disk, and could not be removed without ripping apart the rubber, whereas the hub of the Demco pad was press-fitted and could easily be removed.

It appeared to him that the sponge rubber part of the back-up plate was identical on both the Demco and the Demcor products, but he could not tell if they had been made from the same mold.

In the Demco process of sewing the wool to the fabric back to form the pad, the fabric back is sewn in a contour shape with rounded edges, and then the contoured pad is attached to the rubber backing. After being attached to the contour rubber backing, both pads are curved, but the Demco pad, because it was contoured originally, retains its contour shape better under centrifugal force than does the Demcor pad.

Stanley Holmes, called as a court witness:

In October, 1956, as principal owner of the Stanley H. Holmes Company, he was in the business of producing hydraulic presses and molds for rubber.

DeMichel orally ordered a mold from him on October 9, 1956. Although no drawing was attached to the invoice when it was introduced into evidence at trial, apparently one had been submitted by DeMichel when it was ordered, since the company generally does not make a mold without one. DeMichel picked up the mold on October 29, 1956; however, both DeMichel and Peerless Rubber, the company which later had possession of the mold for purposes of production, were given to understand that the mold would remain the property of the Stanley Holmes Company until released by it. DeMichel never paid for the mold.

Rukin verbally ordered a mold similar to that previously ordered by DeMichel. Since DeMichel had never paid for his mold, the Holmes Company did not manufacture a second one, but informed DeMichel in a letter dated March 22, 1957, that the "nine-cavity mold, sponge rubber disk, per print submitted" had been sold to Rukin. The Holmes Company did not physically deliver the mold to Rukin; he picked up the mold at the Peerless plant. The mold in question was for the production of the sponge rubber cushion, a component of the back-up plate, and did not contain any marks identifying it as a Demco product or as belonging to DeMichel.

The witness could not recall any conversation between himself and Rukin from October, 1956 to March 22, 1957, relative to Rukin's purchasing a mold from the Stanley Holmes Company.

On August 31, 1957, plaintiff ordered a duplicate of the original DeMichel mold. Attached to the invoice for this order was a drawing with DeMichel's name on it. He believed that this design could have been removed from DeMichel's original order and placed with plaintiff's subsequent order for the purpose of duplication. This second mold was delivered to Peerless on plaintiff's behalf on September 26, 1957.

He examined the Demco sponge rubber pad and concluded that it coincided with the drawing which had accompanied plaintiff's order of a duplicate mold 3/8ths of an inch in thickness. He then compared the Demco and Demcor sponge rubber pads and concluded that they appeared to be the same and that they could have been made from the same mold.

Frank DeMichel, for defendant Rukin:

In 1956 and 1957, he was in the business of manufacturing various items for the automobile trade, including buffing pads and back-up plates for buffing pads. He examined the Demco polishing disk and back-up plate and stated that it was of his original design. To his knowledge, there was no other product on the market at the time he produced the Demco pad which had a molded rubber back such as that of the Demco pad. He sold the Demco pad to Rukin for resale, but he did not sell Rukin the idea of the product or any of the equipment used in connection with the manufacture of the product. He applied for, but never received, a patent on the Demco pad.

On December 26, 1957, he signed a contract selling to plaintiff the right to manufacture the Demco pads and plates and the molds necessary for their manufacture. Steadman, plaintiff's agent, notified the rubber companies which possessed the molds that plaintiff had replaced DeMichel as the owner of such molds. After this

sale, DeMichel did not manufacture any more Demco pads, either for himself or for plaintiff.

He examined the sponge rubber pieces of both the Demco and the Demcor products and stated that, due to certain air holes found on one and not the other, he could tell that they had not been made from the same mold. However, the two appeared identical, and the second could have been made from a mold which was a duplicate of the mold which formed the first.

He remembers ordering a mold from the Stanley Holmes Company for the sponge rubber portion of the back-up plate, but does not recall whether the mold had been made or not. He had intended that the mold go to the Peerless Rubber Company, but did not know whether it had ever been delivered there. He does not remember ever receiving a letter from the Stanley Holmes Company informing him that the mold he had ordered had been sold to Rukin.

He never made any arrangement with Rukin for Rukin to pick up that particular mold at the Holmes Company, and he never authorized Rukin to order such a mold, or to copy the Demco pad or any of its component parts.

On December 21, 1967, plaintiff amended its Petition for Rule to Show Cause to further allege that Rukin had obtained some of the actual molds of the Demco products and that, using them, he manufactured and sold polishing pads throughout the country under the name of Demcor.

On January 4, 1968, Rukin filed a motion to strike plaintiff's Amended Petition, but such motion was denied on May 24, 1968, by Judge Lupe.

On March 8, 1968, Rukin filed a motion to vacate the August 2, 1957 injunction against him and that portion of the September 30, 1957 injunction against DeMichel which pertained to Rukin. The motion was denied on March 22, 1968. On April 11, 1968, Rukin filed a petition to reconsider his motion to vacate, and that

motion was denied on May 24, 1968, by Judge Lupe and again on June 10, 1968, by Judge Epstein.

On December 1, 1969, Judge Lupe entered a judgment order finding that: (1) Rukin used that mold manufactured by the Stanley Holmes Company which had been ordered and delivered at DeMichel's request to Peerless Rubber; (2) Rukin used said mold to manufacture the sponge rubber portion of the back-up plate which is a component part of the Demcor back-up plate; (3) said mold was of the same type as was used in the manufacture of the sponge rubber portion of the Demco back-up plate; (4) the Demcor product sold by Rukin to Edward Heck and distributed by the American Impacts Corporation contained component parts of the Demco type product; and (5) Rukin manufactured and sold to persons other than plaintiff a related product which contained component parts of the product known as the Demco product. The court then found Rukin guilty of contempt in that he had wilfully disobeyed the August 2, 1957 injunction. A fine of $250 was imposed.

Rukin now appeals from the following orders: (1) the August 2, 1957 permanent injunction against him; (2) the September 30, 1957 permanent injunction against DeMichel in so far as it pertains to Rukin; (3) the May 24, 1968 denial of his motion to strike plaintiff's amended Petition for Rule to Show Cause; (4) the June 10, 1968 denial of his motion to vacate the permanent injunction of August 2, 1957; and (5) the December 1, 1969 order finding him guilty of contempt and imposing a fine.

Rukin's Notice of Appeal was filed on December 29, 1969, more than 30 days after the entry of the first four orders appealed from. As to the orders designated (1), (2) and (4) in the paragraph next above, the Notice of Appeal was filed too late. This court, therefore, does not have jurisdiction to review those orders, and will not consider the contentions raised on appeal which relate to them, including the issue of the legal propriety of the original injunction order. Supreme Court Rules 301 and 303, Ill.Rev.Stat. 1971, ch. 110A, pars. 301 and 303. However, the order of May 24, 1968, was not at that time appealable, but the issues with regard thereto were merged

into those relating to the decree of December 1, 1969.

The appeal from the December 1, 1969 contempt order and imposition of fine was timely, and in this court Rukin raises three issues: (1) whether the original injunction was void because the trial court did not have jurisdiction, and, therefore, the contempt order, based on the violation of a void decree, is also void; (2) whether the contempt order was supported by the pleadings, proofs and law; and (3) whether the contempt order was valid even though there was no proof of damages.

In regard to Rukin's questioning the jurisdiction of the trial court, Section 125 of the Illinois Business Corporation Act (Ill.Rev.Stat. 1965, ch. 32, par. 157.125), is pertinent and provides in part:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State, until such corporation shall have obtained a certificate of authority.

Rukin contends that plaintiff, a Michigan corporation, transacted business in Illinois without having obtained a certificate of authority, and that the effect of the above statute was to bar it from maintaining this suit. Rukin argues that, although plaintiff did file suit and was granted an injunction, the trial court had no jurisdiction to try the case in the first instance, and that the injunction it issued was therefore void.

If Rukin's assertion is true, the December 1, 1969 contempt order would be invalid because contempt will not lie for violation of a void decree. City of Chicago v. King, 86 Ill.App.2d 340, 354, 230 N.E.2d 41, 48, leave to appeal denied, cert. denied 393 U.S. 1028.

In support of his argument, Rukin cites four cases as holding that a court acquires no jurisdiction to try those cases instituted by a foreign corporation which has not complied with the conditions

prescribed by the foreign corporation laws.[1]

These four cases do not so hold. Each case, it is true, contains language to the effect that a foreign corporation cannot maintain an action in Illinois without having complied with those Illinois laws authorizing it to do business in this state. None of the cases holds, however, that compliance by a foreign corporation plaintiff with the Illinois foreign corporation laws is a prerequisite to the court's acquiring jurisdiction to try the case so that an objection based on plaintiff's non-compliance with such laws could be raised at any time. In each case, a foreign corporation plaintiff had failed to comply with one of the Illinois foreign corporation laws, and the defendant had raised the issue of non-compliance as a defense at an early point in the trial, the court acting upon the motion accordingly. In no case was the foreign corporation plaintiff's non-compliance and capacity to sue treated as a jurisdictional issue.[2] In fact, in the one case in which defendant prevailed, the trial court did not dismiss the case, as it should have done had jurisdiction been lacking, but entered judgment for defendant, which judgment was affirmed. Guest Piano Co. v. Ricker, 274 Ill. 448, 113 N.E. 717.

Other cases dealing with the issue of a foreign corporation's capacity to sue have treated a defense based on plaintiff's non-compliance with the foreign corporation laws not as a jurisdictional

---

1. Those cases cited by defendant as supportive of his argument are: Alpena Cement Co. v. Jenkins, Etc. Co., 244 Ill. 354, 91 N.E. 480; Guest Piano Co. v. Ricker, 274 Ill. 448, 113 N.E. 717; Ryerson & Son v. Shaw, 277 Ill. 524, 115 N.E. 650; and Indiana Harbor Belt R.R. v. Green, 289 Ill. 81, 124 N.E. 298.

2. In Indiana Harbor Belt R.R. v. Green, 289 Ill. 81, 124 N.E. 298, plaintiff's suit was dismissed for want of jurisdiction, the reason being, however, that plaintiff's petition, invoking the special privilege of condemnation, was defective because it failed to specify the source of plaintiff's power to condemn.

issue but as an affirmative defense which, if not presented for timely consideration by the trial court, is waived.

In Romano & Co. v. Baird & Warner, Inc., 262 Ill.App. 165, the court held that a motion to deny a foreign corporation the right to maintain an action in Illinois courts on the ground that it was in default in the payment of its franchise tax is in the nature of a plea in abatement and should be made at the earliest possible time. It then affirmed the denial of defendant's motion to dismiss because it was interposed just before the trial, and defendant's answer, filed four months earlier when the suit had just begun, had not raised that particular defense.[3]

In Metropolitan Opera Ass'n, Inc. v. Metropolitan Opera Ass'n of Chicago, Inc., et al., 86 F. Supp. 526, defendant moved to vacate a judgment entered in favor of plaintiff on the ground that the federal district court, sitting in Illinois, had no jurisdiction to hear the case because plaintiff, a foreign corporation, had not obtained a certificate of authority as was required by Illinois law. The court agreed with defendant that if a foreign corporation which had not complied with the requirements of the Illinois foreign corporation laws would be barred from maintaining a suit in the state courts, it would likewise be barred from suing in the federal courts. However, the court went on to deny defendant's motion to vacate, holding that "though plaintiff might not have maintained its suit in this court if the question had been presented to the court on the trial, the Court was not lacking in jurisdiction to hear and determine the case presented to it," as the jurisdictional requirements, diversity and amount in controversy, were met. In a one-sentence dictum,

---

3. Cahill's St. 1929, ch. 32, par. 128 provided: "No corporation required to pay a franchise tax *** shall transact any business in this State or maintain any action at law or suit in equity, unless such corporation shall have paid such franchise tax ***."

the court stated, "Even had this action been brought in the State court and had the defendant failed to raise the question the judgment would not have been void, but could have been enforced were no appeal taken." See also Emcee Corp. v. George, 293 Ill. App. 240, 12 N.E.2d 333, where the court held that the suit of a foreign corporation should not be dismissed because the corporation had not obtained a certificate of authority because, among other reasons, if it should thereafter obtain the certificate, it could then proceed with the suit.

From these cases, it can be concluded that the foreign corporation plaintiff's having a certificate of authority is not a prerequisite to the court's acquiring jurisdiction over a suit filed by that corporation, and its failure to obtain a certificate (if proved that the corporation's business in this state required such), is a defense which will be considered waived unless raised by defendant at the earliest opportunity in the trial. In the instant case, Rukin's raising of this defense was not timely. Although served personally with summons, he failed to appear and answer the complaint, and the trial court found him in default. On April 30, 1957, and on August 2, 1957, a preliminary and then a permanent injunction were issued against him. No timely appeal was taken from the issuance of either injunction. Thereafter, Rukin filed three pleadings before finally raising the issue of plaintiff's failure to obtain a certificate of authority in a motion filed on May 2, 1967, nearly 10 years after the injunction had been issued. By failing to make timely issue of the point in the trial court, Rukin waived whatever objection he may have had concerning plaintiff's capacity to sue.

In our opinion, the trial court had jurisdiction of both the parties and the subject matter, defendant being properly served with summons, and a complaint for injunctive relief being a proper matter for the court to hear. With jurisdiction established, the

trial court's injunction was valid; it must then be obeyed, under pain of contempt, until set aside by the issuing or reviewing court (Faris v. Faris, 35 Ill.2d 305, 220 N.E.2d 210), and no questions as to its erroneous or voidable character may be litigated in a contempt proceeding. Board of Jr. College v. Cook County T. Union, 126 Ill.App.2d 418, 426, 262 N.E.2d 125, 128-129.

The issue now remaining before us is whether the evidence presented was sufficient to sustain a finding of contempt.

Before the August 2, 1957 injunction was issued, Rukin had ordered a mold for the production of the sponge rubber portion of the back-up plate from the Stanley Holmes Company. There can be no doubt that the mold which he bought from the Holmes Company and which was released to him by the Peerless Rubber Company was the Demco mold, which had been ordered and put into production by DeMichel. Rukin may have had no knowledge that the mold had originally been the Demco mold, but, as he had once distributed the Demco product, he knew the design of all of its component parts. Therefore, when he went to the Holmes Company, he knew he was ordering a similar mold, as evidenced by the fact that the Demco mold fit his order exactly. Rukin delivered that mold to the Judson Rubber Co. for production, and with that component piece and others produced for him, he manufactured and distributed the Demcor polishing pad until May 7, 1965, at which time he sold the molds and all rights to the Demcor product to Ed Heck of the American Impacts Company.

Although the names of the two products differ, the Demco and Demcor polishing pads appear identical. Since the wool polishing pads look similar and the sponge rubber pieces were made from duplicate molds (plaintiff having to order a second mold after Peerless released the first to Rukin), the products are indistinguishable because the only portions of the fully assembled product which are visible are the wool polishing disk on the one side and the sponge rubber portion of the back-up plate on the other.

By incorporating this sponge rubber part, of primary importance to the appearance of the finished product, into the Demcor polishing pad, Rukin was, in effect, distributing a Demco or Demco-type product after the issuance of the injunction.

Therefore, there was sufficient evidence to find that Rukin had used a mold which had been used in the manufacture of the sponge rubber portion of the Demco back-up plate, had had this component part manufactured for himself, incorporating it into his Demcor product, and had sold a Demco-type product to someone other than plaintiff.

In a contempt proceeding for the violation of an injunction, proof of guilt must be established by a preponderance of the evidence. McBride v. The People, 225 Ill. 315, 80 N.E. 306. This standard of proof was met, and the trial court's finding of contempt was not manifestly against the weight of the evidence. Schulenburg v. Signatrol, Inc., 37 Ill.2d 352, 226 N.E.2d 624.

Rukin lastly contends that it was imperative for plaintiff to prove not only a violation of the injunction decree, but also that damages were sustained as a result of that violation. He cites The People v. Diedrich, 141 Ill. 665, 30 N.E. 1038, to support his claim that since there was no proof of damages, the contempt finding cannot stand.

Such authority is inapplicable here. In that case, the defendant had been enjoined from manufacturing certain furnaces. The evidence at the contempt hearing showed that defendant was, indeed, manufacturing those furnaces, but only in a territory in which plaintiff had no right to manufacture them. The court held, then, that since it was not obvious as to how defendant's actions could interfere with plaintiff's business, it was incumbent upon plaintiff to show not merely a breach of the injunction, but also that plaintiff had been injured thereby.

In the instant case, however, the evidence showed that those interests which were protected by the injunction were exactly those which were being violated, and, there being no suggestion that plaintiff had parted with or lost those rights which had been the basis of the injunction, injury and legal damage will be inferred. Loven v. The People, 158 Ill. 159, 42 N.E. 82. It is also to be noted that plaintiff offered to prove monetary damages during the course of the proceedings, but that such proof was refused when the trial judge stated that his only interest was whether or not the injunction had been violated.

The judgment of the circuit court is affirmed.

A F F I R M E D.

DRUCKER, P.J., and LORENZ, J., concur.

(Publish abstract only)

55548

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
EDDIE JUNIOR WOODS,	)	HONORABLE
	)	RICHARD J. FITZGERALD,
Defendant-Appellant.	)	PRESIDING.

MR. PRESIDING JUSTICE DRUCKER delivered the opinion of the court:

After a jury trial defendant was convicted of murder and received a sentence of 25 to 50 years.

On appeal defendant contends that: (1) he was denied effective assistance of counsel because he was compelled to go to trial with a lawyer with whom he refused to cooperate and whom he disavowed; (2) he was not proven guilty beyond a reasonable doubt; and (3) it was error to admit into evidence a table model cigarette lighter and a table leg as possible murder weapons because there was insufficient evidence to link them to defendant.

The State alleged that defendant on September 13, 1968, beat his wife, Mary Woods, to death, and that he remained with her decomposing body until September 19, 1968, when one of his daughters summoned help.

At trial the State presented two of defendant's children, Francheska and Eddie, who had seen defendant beating his wife on September 13, 1968, and a third child who was living with her grandfather and who was summoned by Francheska Woods on September 19. The State also called four police officers and a pathologist.

The defendant testified in his own behalf. He also called a psychiatrist and two of the State's witnesses in an attempt to impeach them.

Sharon Grace Woods, daughter of the defendant and the deceased, testified for the State: On September 19, 1968, she lived with her grandfather. She was 15 years old at that time. On that date she received a phone call from her sister Francheska

who was calling from her aunt's house. Sharon, Francheska, Mrs. Gilliam, their aunt, and Perlene Johnson then proceeded to defendant's apartment at 2850 North Clark Street, Chicago. When they arrived, they called the police. A uniformed officer arrived. They unsuccessfully tried to gain entry through the front door. They then tried knocking on the rear door. After waiting awhile, defendant opened the rear door. Sharon Woods asked him: "Where's Mommy? What have you done to her?" Defendant shrugged his shoulders and walked away. As the police officer was talking to defendant, Sharon began calling for her mother. She went down the hall to the bedroom, opened the door, but was unable to see anything because the room was too dark. She borrowed the police officer's flashlight, aimed it in the bedroom and saw her mother's body lying on the bed, swollen and black. Sharon testified that defendant had hit his wife on previous occasions prior to June 1968 when the witness ran away from home.

On cross-examination Sharon testified that when defendant opened the door, he was wearing only a shirt, had on no trousers or shorts. She testified that the odor in the house prevented her from being able to detect the presence of alcohol on defendant's breath. She saw liquor bottles in the living room.

Officer Jerome Hanrahan testified for the State: On September 19, 1968, he was driving a squadrol and received a call to remove a body from 2850 North Clark Street. He testified that the body was full of maggots.

Eddie Woods, defendant's son, 13 years old at time of trial, testified for the State: He was 11 years old at the time of the homicide. He lived at home with his brothers and sisters in their third floor apartment at 2850 North Clark Street. The other apartments were vacant.

On September 13, 1968, he came home from school at 3:30 P.M.

with some of his brothers and sisters. Defendant was yelling at his mother when he arrived. Defendant yelled briefly at Eddie and the other children and then returned to Mary Woods and resumed yelling at her. As defendant and his wife were walking out of the bedroom, defendant "took her by the hair and bumped her head up against the wall." At the time Eddie was standing 30 feet away. His brothers and sisters were with him when he witnessed the incident. After defendant and his wife entered the bedroom, Eddie heard noises, "like he was yelling and throwing her on the floor." He had seen defendant beat his mother on previous occasions. He and his brothers and sisters watched television as the noise continued. He did not see his mother come out of the bedroom after that.

Eddie also testified that on September 13 defendant was wearing his underwear. On September 14 he came out of the bedroom wearing a shirt with blood on it. Eddie identified the shirt as People's Exhibit 7. During the period of September 14 to September 18 defendant would come out of the bedroom and go to a couch in the living room or a couch in the dining room.

On cross-examination Eddie testified that he could hear his mother screaming when his parents returned to the bedroom. Eddie went to the bedroom door to ask his father for money to buy ice cream. Looking into the bedroom he could see his mother on the bedroom floor. When he returned with the ice cream, his mother was on the floor of the hallway and defendant was yelling at her. When the children finished their ice cream, defendant ordered them to go to bed.

Detective John Durkin testified for the State: He was assigned to the homicide investigation and was called to the apartment on September 19, 1968. He observed the deceased in defendant's bedroom in a state of decomposition. The face was

covered with maggots. He also saw maggots in what appeared to be pools of blood on the floor. Later, at the police station, he saw maggots in defendant's hair. He also testified that the apartment was in a state of disarray.

On cross-examination he testified that he found a table leg in the bedroom. In his opinion defendant was not intoxicated on September 19, 1968, the day of his arrest. The officer did, however, find beer cans in defendant's bedroom and an empty liquor bottle in the pocket of a pair of trousers found in the living room.

Detective John Bickler testified for the State: He was the partner of detective Durkin. His testimony was essentially that of detective Durkin's, testifying as to the condition of the apartment, the condition of defendant's bedroom. Bickler also identified a table lighter which was introduced into evidence. It was found on a radiator in the living room. The table lighter, as well as the table leg, were sent to the police lab to determine whether certain stains on them were blood. In his opinion on September 19, 1968, defendant was not intoxicated but smelled of alcohol.

Francheska Woods testified for the State: She was 14 years old at the time of trial. On September 13, 1968, when she returned from school in the afternoon, she saw her father, defendant, grab her mother's braids in one hand and push her head against the door with the other. Her mother fell to the floor and defendant began "stomping" on her. He then ordered the victim into the bedroom. She heard noises coming from the bedroom until about 7:30 in the evening, and the noises sounded like "beating" and "stomping." She estimated that the beating began around four o'clock. She and her brothers and sisters did not do anything when they heard the noise, but her younger

brothers and sisters were crying. At about six in the evening defendant came out of his bedroom. Francheska ran backwards in fear of being struck. Defendant swung at her and then continued to the living room and sat down. After about ten minutes he returned to the bedroom and resumed beating his wife. She could hear her mother pleading with defendant. From September 13, 1968, until September 19, when she left the apartment to get help, Francheska did not leave the apartment. She testified that on one of the days during that interval, defendant came into her room when she was asleep, woke her up and told her to follow him. She was led to the doorway of defendant's bedroom. Defendant said: "Look at her." Her mother was dead and her body swollen. He then told her to sit down. She went to the dining room, sat down and was joined by defendant. Defendant said: "What if I told you I killed her?" and "Is there some way we can get rid of her?" The witness remained silent, and defendant told her to go back to bed. She decided to run away at the first opportunity.

Officer Richard Gorrell testified for the State: On September 19, 1968, he was assigned to a squad car and responded to a call to report to 2850 North Clark Street at about 6:50 P.M. At that address he found Sharon Woods, Mrs. Johnson and Mrs. Gilliam on the sidewalk. After speaking with them, he proceeded to the front door of the apartment. There was no answer and they then tried the rear door. Defendant opened the door after a few minutes. He was wearing only a shirt. Officer Gorrell was of the opinion that defendant was sober. After talking to defendant, the officer had to chase defendant around the apartment. Meanwhile the women proceeded to the bedroom. They then asked Officer Gorrell for his flashlight.

Dr. Jerry Kearns testified for the State: He is a pathologist

for the Coroner of Cook County and performed an autopsy on defendant's wife. He testified that the cause of death was the result of extensive brain damage caused by a fragmented fracture of the parietal bone on the left side of the head. He testified that the injuries were inflicted by a blunt instrument, possibly the table leg introduced by the prosecution as People's Exhibit 8. He placed the time of death at about six or seven days before he first saw the body on September 19 and performed the autopsy on September 20.

Eddie Junior Woods, the defendant, testified in his own behalf: Approximately one week before his wife's death he began drinking heavily. The night of the incident he woke up in the middle of the night and went down to the "Puerto Rican" tavern on the first floor of his building. He was refused service and proceeded to a tavern at Diversey and Halsted Streets. A "Puerto Rican guy" who owned a tavern,apparently the tavern in his building, asked defendant where he lived and told defendant that he was coming up to see defendant's wife. When he returned home, he saw the rear door of his apartment open. When he entered the bedroom, he saw a man standing at the foot of the bed, and his wife was on the bed. He was then hit on the head from behind.

Defendant's testimony was vague on several points and often incoherent. He testified that he attempted to make it into bed after being hit but also testified that he did not attempt to make it into bed when he was hit; that he did not regain consciousness until the evening following the assault; and that he awoke on the couch where he had been sleeping, went into the bedroom and found his wife lying on the floor covered with blood. He also testified that he slept in bed with his wife on the night of the assault and awoke the next morning with his wife beside him.

Dr. William H. Haines testified on behalf of the defendant:

He is a psychiatrist. He had examined the defendant on three separate occasions for the purpose of determining his competence to stand trial. The examinations were on January 10, 1969, February 20, 1969, and August 4, 1969. The defendant in his opinion is a sociopath. He testified that a sociopath under the influence of alcohol can become psychotic.

On cross-examination Dr.Haines testified that his reports of the first two examinations of defendant concluded that defendant understood the charges against him and could cooperate with counsel. Dr. Haines also testified that in his opinion on September 13, 1968, defendant was able to appreciate the criminality of his acts and conform his conduct to the requirements of the law, assuming nothing to the contrary in his reports. On redirect examination Dr. Haines testified that he did not actually know what happened on September 13, 1968.

Opinion

Defendant first contends that he was denied a fair trial and effective assistance of counsel because he refused to cooperate with his court appointed counsel whom he disavowed in open court.

The record indicates that defendant's counsel was the fifth attorney to represent defendant. His first attorney was appointed on December 30, 1968. On March 21, 1969, the public defender was appointed. A third lawyer (an associate of Mr. Burt Hoffman) filed an appearance on July 2, 1969. The fourth lawyer represented defendant from July 2, 1969, until August 7, 1969. Attorney Hoffman requested leave to withdraw because of a conflict of interest since he was an attorney for George Gilliam, brother of the deceased.

On the first day of the trial, just prior to selection of the jury, defendant informed the court of his objection to his fifth lawyer, Mr. Malek:

> Defendant: This man, I don't want him saying one word, I don't recognize him as my lawyer. He is a conspirator, Judge. * * *
>
> Defendant: Your Honor, you are forcing this man on me. Why are you doing this? Why are you forcing Attorney Malek on me when he is, I can prove he is a conspirator. In other words, this man you have given me four lawyers in this Court.
>
> The Court: And if I give you five more you will be doing the same thing with the other five that you did with the last four.
>
> Defendant: Anyone you gave I can prove conspiracy by. As far as I am concerned, you are a conspirator yourself, and I can prove it. Take me to trial and that is what I want to do because I can prove to you, sir. I've tried, I want to go to trial, I want trial any time. I haven't wanted trial but I want it with twelve people and I don't want it in your Court. The only thing I want from your Court, sir, is a dismissal or a change of venue.
>
> Let the record show that. You are not fit to try me.

Defendant cites United States v. Seale, 461 F.2d 345 (7th Cir. 1972) and Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970) for the proposition that he was denied effective assistance of counsel since he openly disavowed his counsel and refused to cooperate with him.

Having examined the record we find these cases to be of no help to defendant. When a defendant expresses his desire for a different attorney, the above cited cases make it clear that the duty of the court is to inquire as to the reason for dissatisfaction and then make a ruling. Seale at 359. In the case at bar defendant made known his objections at the beginning of the trial so that a timely ruling was possible. The judge was made aware of the reasons for defendant's dissatisfaction as illustrated in part by the portions of the record quoted above. Defendant's objection to his counsel was that he considered him to be a "conspirator." Indeed, defendant also indicated that

the judge himself was in his opinion a "conspirator" and that any other attorney would be a conspirator too. We find no error in the court's refusal to appoint still another attorney.

Furthermore, we note that Mr. Malek served diligently as counsel. The record indicates that he was vigilant and vigorous in his cross-examinations. He not only attempted to discredit the prosecution witnesses but also attempted to provide a good defense. He attempted to establish that defendant was insane at the time of the homicide and/or intoxicated. In his brief defendant maintains that counsel did not cooperate with defendant in proceeding under defendant's account of the homicide. We disagree. Many of Mr. Malek's questions of various prosecution witnesses were clearly asked with a view towards establishing the possibility that the homicide was committed by someone other than defendant. Apparently defendant is contending that because Mr. Malek did not produce another suspect, he failed to render effective assistance of counsel. Clearly Mr. Malek was under no such duty although, as stated above, he did attempt to present to the jury the possibility that the homicide was committed by someone other than defendant.

Defendant next contends that the evidence did not prove him guilty beyond a reasonable doubt. As set forth in People v. Hampton, 44 Ill.2d 41, 45, 253 N.E.2d 385:

> [I]t is the function of the trier of the facts to determine the credibility of the witnesses and its finding of guilty will be disturbed only where the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. [Citing cases.]

Having reviewed the record, we find that the evidence did establish defendant's guilt beyond a reasonable doubt. Defendant argues that there was no eyewitness to the fatal blow. It is well established that guilt may be determined by circumstantial evidence. Moreover, defendant's argument is merely speculative

as to whether or not the blows witnessed by the children were not in fact fatal since the mere fact that the victim did not die immediately does not rule out possibility that they were the blows which ultimately resulted in her death. Defendant also points out certain discrepancies in the testimony of defendant's children, Eddie Woods and Francheska. Such discrepancies were matters going to the weight to be given their testimony, and we see no basis for upsetting the findings of the jury. Moreover, such discrepancies have sometimes been said to be an indication of truthful testimony as opposed to false or well rehearsed fabrications.

Finally, defendant contends that it was error to admit the table leg and cigarette lighter in evidence as the possible murder weapons because there was insufficient evidence to connect these items to defendant. We disagree. With respect to the table leg, the pathologist from the coroner's office testified that it could have been the blunt instrument used to inflict the fatal wounds. It was found in defendant's bedroom, and defendant, according to the testimony of the children and defendant, had been in the bedroom during the period of September 13 to September 19. With respect to the cigarette lighter, defendant himself testified that he found it in the kitchen, and that he "figured that must have been what she was hit with." The lighter was badly damaged, the working part of it being almost disconnected from the base. Detective Bickler testified that it appeared to have blood stains on it. Under these facts we find no error in the admission of the table leg and lighter.

The judgment of the circuit court is affirmed.

AFFIRMED.

English and Lorenz, JJ., concur.

Abstract only.

57452

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	
CURTIS EVANS, Defendant-Appellant.	HONORABLE JOHN J. McDONNELL, Presiding.

PER CURIAM:*

Following a bench trial, defendant, Curtis Evans, was convicted of unlawful use of weapons and failure to have in his possession an Illinois firearm owner's identification card. (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a) (4) and par. 83-2(a).) He was sentenced to concurrent terms of one year of probation, the first thirty days to be served in the House of Correction. On appeal, he contends the weapon in question should have been suppressed because it was secured through a warrantless search of the defendant's person, incident to an invalid "stop and frisk."

This court recently had occasion to consider the application of the Illinois "stop and frisk" law (Ill. Rev. Stat. 1971, ch. 38, par. 107-14 and par. 108-1.01) in People v. Watson (1972), 9 Ill. App.3d 397, 292 N.E.2d 457. The two requirements we formulated as follows:

> "First, the 'stop' itself must be justified by 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' (Terry v. Ohio, 392 U.S. 1, 21.) Inarticulate hunches cannot suffice; rather, the objective determination to be made is whether 'the facts available to the officer at the moment of the seizure * * * warrant a man of reasonable caution in the belief that the action taken was appropriate.' (Terry v. Ohio, 392 U.S. 1, 22.) Second, assuming a valid 'stop,' a limited search of the suspect for weapons is justified only if 'a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' (Terry v. Ohio, 392 U.S. 1, 27.)" 9 Ill.App.3d 397 at 400.

Applying these principles to the case at bar, the "stop and

frisk" was valid. The police officer first noticed defendant slumped over the wheel of his car, which was parked with its engine running and its headlights on at 4:10 A.M. in a high crime rate residential area. The first time he noticed this, the officer took no action, but ten minutes later when he returned to find the same situation, he decided -- properly so -- to investigate. Under these circumstances, a brief stop to determine the individual's identity, or to maintain the status quo momentarily while obtaining more information, was reasonable. Adams v. Williams (1972), 407 U.S. 143. These circumstances also suggested the possibility of a "distressed person," a possibility which reasonably and properly warranted investigation by the police officer, irrespective of the presence or absence of any criminal activity. People v. Smith (1970), 47 Ill.2d 161, 164, 265 N.E.2d 139. Therefore, the "stop" was valid.

The next question is whether the police officer's belief that his safety was in danger was prudent. When the officer approached the vehicle, he noticed defendant slumped on the seat. Thinking that defendant was asleep, the officer attempted to wake him, but there was no response. The officer then asked defendant to step out of the car, and when there still was no response, he went around to the other side of the automobile and again repeated his request. By this time the headlights had been turned off. Unexplainedly, defendant then "abruptly slid over on the seat and got out of the car." When the officer then "recognized," as he testified, a bulge in defendant's coat pocket, he believed he was justified in conducting a limited pat-down search for his own protection. Under the circumstances, this belief was reasonable. The search of defendant's coat pocket produced a revolver. The "stop and frisk" was valid and accordingly, the motion to suppress was properly denied. People v. Lee (1971), 48 Ill.2d 272, 269 N.E.2d 488. The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(FIRST DISTRICT, SECOND DIVISION)

* LEIGHTON, J., did not participate.

13 I.A.3 594

72-231

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE THOMAS J. MORAN, Justice
HONORABLE GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On July 18, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 72-231

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ELZIE JONES, Defendant-Appellant.	)	Appeal from the Circuit Court for the 16th Judicial Circuit, Kane County, Illinois.

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Elzie Jones, was indicted for Armed Robbery, and Attempt Armed Robbery, both arising from the same incident. After negotiations, defendant entered a guilty plea to both charges. Judgment of conviction was entered on both the principal and inchoate charge but a single sentence of 5 - 7 years imprisonment was imposed in accordance with the plea agreement, to be served concurrently with a 2 - 4 year sentence previously entered in Cook County.

Defendant appeals, contending that he was not admonished in substantial compliance with Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch.110A,par.402); and that the attempt conviction arising from the same incident as the armed robbery must be vacated pursuant to section 8-5 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38,par.8-5), and the case remanded for resentencing on the armed robbery conviction. We have taken with the case a subsequent alternative motion for modification of sentence under the Unified Code of Corrections.

We agree that the total record does not show that defendant was admonished in substantial compliance with Supreme Court Rule 402. The nature of the charge, the factual basis for the plea, and the determination that the plea was defendant's voluntary act all were sufficiently established. However, the court in accepting the guilty plea failed to admonish the defendant personally that in pleading guilty he waived a jury trial, and also failed to state at that time the minimum and maximum sentence prescribed by law. Further, the court did not specifically admonish the defendant that he was waiving a trial of any kind, that he had a right to confrontation of witnesses against him, a right not to plead guilty and to persist in that plea.

The State has argued with considerable persuasion that the rationale of Supreme Court Rule 402 to insure a voluntary and knowing plea has been satisfied in a practical and reasonable sense notwithstanding the absence of the designated specific statements to the defendant. In urging affirmance the State points to the following considerations: defendant acknowledged having discussed the matter with counsel; the plea was negotiated 7 months after defendant had entered his not guilty plea on arraignment so that he had ample time for reflection; defendant over this time was represented by three different attorneys; prior to accepting the plea the court referred to the fact that the case was set for jury trial; on the arraignment some 7 months prior to the guilty plea, although defendant was then without counsel, a plea of not guilty had been entered for him and he had been told that the offense carried a minimum of 2 years and a maximum of infinity (the court did not distinguish between the differing terms for the principal and inchoate offenses); defendant had 13 years of schooling and had signed a written form which included a jury waiver and a handwritten

reference as to the range of sentence, "2 - infinity", as well as the other required admonishments; no possible prejudice resulted because the sentence actually imposed was the one negotiated and, moreover, was the statutory minimum for armed robbery; defendant was no stranger to criminal proceedings; and he voluntarily entered his plea after acknowledging acts which made up the principal offense.

We will not attempt to reconcile the cases which have ruled upon the effect of the absence of various of the specific admonishments under Supreme Court Rule 402 on the question whether there has been "substantial compliance" with the Rule. We must conclude, however, that in view of the omission of significant specific admonishments there has not been substantial compliance. Compliance with the specific requirements of Rule 402 is neither difficult nor time consuming whereas an after-the-fact assessment of whether substantial compliance has been achieved is likely to be both burdensome and uncertain where significant or numerous omissions have occurred. We therefore vacate defendant's plea so that he may plead anew.

The State has properly conceded that defendants cannot be convicted for both the principal offense of armed robbery and the inchoate offense of attempt armed robbery arising from the same incident. (Ill.Rev.Stat. 1971, ch.38,par.8-5; People v. Green (1970), 130 Ill.App.2d 609, 613.) This error, of course, should be avoided on remand. The motion for summary reduction of sentence is not justiciable and is therefore denied in view of our opinion.

Judgments of conviction vacated and cause remanded with directions.

GUILD, P.J. and THOMAS J. MORAN, J. concur.

No. 72-265

13 I.A.3 603

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	Appeal from the Circuit Court of Wayne County.
vs.	
CHARLES LEO CLUTTER, Defendant-Appellant.	Honorable Harry L. Ziegler, Judge Presiding.

PER CURIAM:

This is an appeal from the denial of appellant's post-conviction petition filed in Wayne County. The issues presented in the petition are proper for post-conviction relief. Appellant's briefs were filed in the Supreme Court in July, 1972 and the case was transferred to this Court in September, 1972. Although extensions were repeatedly granted the People over the succeeding nine months, the People have failed to submit a brief. At the expiration of the last extension, the People filed a motion to dismiss the appeal for mootness because appellant has been paroled.

It is not the duty of this Court to act as advocate for the People as well as adjudicator, nor can justice properly be served thereby. When the People fail to respond to grave allegations on appeal and cast upon the Court the added burden of theorizing and establishing the Peoples' position, concerned and subjective advocacy, the cornerstone of Anglo-American jurisprudence, bears the loss. Although this Court has on occasion seen fit to consider on its merits the appeal of a criminal case even though a People's brief is lacking, we strongly reiterate that this is a matter within the discretion of the Court (People v. French, No. 71-222, Feb. 5, 1973; People v. Spinelli, 83 Ill.App.2d 391, 227 N.E.2d 779) and should not be viewed by the State as a sign that the People will be allowed to shirk their responsibility habitually.

Appellant has served his sentence and has been paroled. The People now assert that his parole renders moot the issues presented in his petition. However, completion of sentence and release from custody do not render an appeal moot (Sibron v. New York, 392 U.S.40, 88 S.Ct. 1889, 20 L.Ed.2d 917). Appellant in the instant case is on parole, which renders him liable to return to the penitentiary for further misconduct without conviction.

The State's motion is denied and, because of the People's failure to file briefs on appeal, the judgment of the circuit court of Wayne County denying appellant's post-conviction petition is reversed pro forma.

Reversed.

PUBLISH ABSTRACT ONLY.

No. 57650

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
WILLIE BROWN,	)	HONORABLE
	)	KENNETH R. WENDT,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Defendant was charged by indictment with the crime of aggravated battery in violation of section 12-4 of the Criminal Code. (Ill.Rev.Stat. 1969, ch.38, par.12-4.) After a bench trial, he was found guilty and sentenced to one and one-half years to four and one-half years.

Defendant wished to appeal and counsel was appointed to represent him, but after examining the records, counsel filed a petition in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the petition has also been filed. The brief, in effect, states that an appeal in this case would be wholly frivolous. On March 5, 1973, a copy of the motion and brief was mailed to defendant and he was informed that he could file any points he might choose in support of his appeal before June 15, 1973. He has not responded.

The petition and brief of appointed counsel alleged that the only possible basis for an appeal would be whether the defendant was proven guilty beyond a reasonable doubt.

At trial, Monroe Harvey testified that on January 23, 1971, he was in McGowan's Bar, located in the 1400 block of East 67th Street, Chicago, Illinois, when he was approached by the defendant, who wanted to talk to him in the bathroom. Mr. Harvey refused, saying he was in a hurry. Defendant twice grabbed Mr. Harvey's arm, but each time Harvey broke away. Defendant then left the bar. Mr. Harvey thereafter left the bar and got into the back seat of an automobile, sitting next to Azell Boddie. Defendant

then came up to the passenger side of the automobile and started shooting. Mr. Harvey was struck in both hands and Mr. Boddie was struck in the stomach. Several weeks later, Mr. Harvey identified the defendant's photograph from approximately five photographs which he was shown.

Azell Boddie testified that on January 23, 1971, he was shot in the stomach outside of McGowan's Bar as he sat in the back seat of an automobile with Monroe Harvey. He had been drinking earlier that day and did not get a look at the person who shot him.

Richard Peck, a Chicago police investigator, testified that on February 10, 1971, while executing a search warrant for the apartment of one Fletcher Pugh, he found seven men present within the apartment. One of the men shoved a gun into the couch. Defendant Willie Brown was one of the men in the room. The gun was recovered and sent to the Police Crime Laboratory, where it was established that the bullets taken from Mr. Boddie's body and the car in which Harvey and Boddie were seated at the time of the shooting were fired from that gun.

Defendant Willie Brown testified that on January 23, 1971, he was in McGowan's Lounge when Monroe Harvey entered. An argument developed over a gambling debt owed to defendant by Harvey. During the argument Harvey pulled a knife and cut the defendant. Defendant left the bar with Monroe Harvey in pursuit. Once outside the bar, Harvey took a swing at the defendant and defendant ran down the street. Defendant testified that as he was going down the street he heard shots fired, but did not see who fired the shots. Defendant never received medical treatment for the wound he received in McGowan's Tavern.

David Bohannon, the bartender for McGowan's Lounge, testified for the defense. He stated that he observed a fight between Monore Harvey and defendant in McGowan's Lounge. During the fight, Harvey pulled a knife and cut defendant's hand. Both men left the bar and he did not hear any shots.

Earl Moore testified for the defense and said that he observed the fight between Monroe Harvey and defendant in McGowan's Lounge. Monroe Harvey had a knife. Defendant left the bar, with Harvey following. The fight continued until the defendant broke loose and ran down the street. Moore then heard shots, but did not see who fired the shots.

Chicago police investigator Robert Dudak testified that in investigating this case he had a conversation with Mr. Bohannon. Bohannon told him of the fight but at no time mentioned that either man had a weapon or that either man was injured in the fight.

The testimony of one witness alone, if positive and credible, is sufficient to convict even if contradicted by the accused. (People v. Guyton, 114 Ill.App.2d 394, 252 N.E.2d 665.) In a bench trial it is the function of the trial judge to determine the credibility of witnesses and the trial court's findings will not be disturbed unless the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. (People v. Gantz, 8 Ill.App.3d 396, 290 N.E.2d 392; People v. Morris, 7 Ill. App.3d 1055, 289 N.E.2d 73.) In the case at bar, after a full review of the entire record, we cannot say that the prosecution's evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. There was ample evidence to support the trial judge's finding that the defendant was proved guilty beyond a reasonable doubt.

After a full examination of the proceedings in accordance with the dictates of Anders, we concur with appointed counsel that the point raised is not arguable on its merits and that an appeal is wholly frivolous. Our examination of the record does not disclose any additional possible grounds for an appeal.

The motion to withdraw is allowed and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;
judgment affirmed.

Third Division. Mr. Justice Schwartz did not participate.

No. 58350

STANLEY A. NELSON & COMPANY, INC., Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	)	
MODULAR INTERIORS, a corporation, et al., Defendants-Appellants	)	HONORABLE HAROLD SIEGAN, PRESIDING.

MR. JUSTICE McGLOON delivered the opinion of the court:

This is an appeal by the defendant, Stouffer Restaurant & Inn Corporation, from an order of the circuit court of Cook County, entered September 12, 1972, denying the defendant's motion to vacate a consent order. The consent order, entered on June 20, 1972, directed the defendants to pay $16,919.25 to the plaintiff and terminated the lawsuit instituted by the plaintiff. In this appeal the defendant alleges that the trial court erred in denying its motion to vacate the consent order because the order was the result of mutual mistakes of law and fact induced by the plaintiff. The plaintiff contends that the motion to vacate the consent order was properly denied.

We affirm.

The proceedings that produced this appeal began in February, 1972, when the plaintiff, a subcontractor, filed a complaint to foreclose a mechanics lien against the defendants. The plaintiff joined as defendants Prudential Insurance Corporation, the owner and lessor of the premises upon which the construction work was done, the instant defendant, Stouffer Restaurant & Inn Corporation, the lessee of those premises, and Modular Interiors, the general contractor who had subcontracted the work to the plaintiff. The complaint alleged that the plaintiff was hired by Modular to do carpentry and masonry work, that the plaintiff had completed the work, that it had not been paid, and that it had served the defendants with the proper notice of lien. The complaint asked for foreclosure of the lien pursuant to various provisions of the Mechanic's Lien Act (Ill.Rev.Stat. 1971, ch.82, par.1-39). The

defendants'answer pleaded the affirmative defense of late notice in that the plaintiff had failed to comply with the requirements of Ill. Rev.Stat. 1971, ch.82, par.24.

On June 20, 1972, a pretrial conference was held and those present, besides the judge, were counsel for plaintiff, an Ohio attorney who was the Secretary and General Counsel of Stouffer Restaurant & Inn Corporation, and counsel for defendant, a member of the Illinois Bar and employed by Stouffer's parent corporation. There was no transcript of the proceedings taken during this conference. However, a general summary of what occurred was reconstructed during the hearing on the defendant's motion to vacate. All of the parties present at the later hearing agreed that during the course of the June 20 conference, the trial judge asked counsel for plaintiff how he would respond to the defendants' affirmative defense of late notice. Plaintiff's counsel then argued that Section 24 of the Mechanic's Lien Act (Ill.Rev.Stat. 1971, ch.82, par. 24) requiring notice of claim of lien to be filed within 90 days after completion of the contract, did not apply to the defendants because Stouffer was a non-resident corporation. He further contended that instead, Section 25 (Ill.Rev.Stat. 1971, ch.82, par. 25) applied, giving the plaintiff at least 120 days to file its notice of lien.

The trial judge later stated that at this point during the June 20 conference he turned to the pertinent portions of the statute and presented it to defendant's counsel, an Ohio attorney who read the statute and stated that he agreed with plaintiff's interpretation. At the later hearing on the defendant's motion to vacate, the trial judge stated that on June 20 he made no ruling as to what section of the statute applied in the instant case and he denied specifically the defendant's allegation that he concurred in the plaintiff's interpretation of Sections 24 and 25 of the statute. He further stated that he did nothing that would have caused the defendant's counsel to abandon their alleged defense.

The defendant's attorneys abandoned their alleged defense

and signed a consent order agreeing to pay the plaintiff the total amount of its claim. Shortly thereafter, on July 12, 1972, Stouffer filed a motion pursuant to Section 68.3 of the Civil Practice Act (Ill.Rev.Stat. 1971, ch.110, par.68.3) to vacate the order of June 20.

After a hearing on the motion the trial judge denied it stating, in substance, that because a consent order merely records the agreement of the parties, it is not a judicial determination nor a judgment of the court and therefore cannot be set aside unless both parties agree to do so.

In this appeal the defendant argues that the trial judge should have vacated the consent order of June 20 since that order was based upon a mutual mistake of law induced by the plaintiff and concurred in by the trial judge. In support of its position, the defendant relies heavily upon certain dicta in Paine v. Doughty (1911), 251 Ill. 396, 96 N.E. 212. In that case the plaintiff entered into a decree by consent to terminate litigation in which she was involved. The plaintiff later discovered that the decree had not disposed of certain real estate in the manner she had previously believed it did. On appeal the court held that the trial court could not have committed any error because a decree by consent is not a judicial determination of the rights of the parties, but merely a record of an agreement of the litigants. The court then went on to say that a mistake of law by one of the parties to a contract deliberately reduced to writing and executed is not sufficient reason to set it aside unless such mistake is induced by the other party.

The defendant here contends that this dicta establishes a "mistake-inducement" rule that would allow the vacation of the consent order in the instant case. This dicta does not represent law in Illinois. The cases are clear in holding that a consent decree which is acceptable to the parties themselves as a determination of a controversy and is sanctioned by the court is binding on them except in cases where the consent was obtained by fraud, the agreement is unreasonable, or contrary to public morals. City

of Kankakee v. Lang (1944), 323 Ill.App. 14, 54 N.E.2d 605; Conaer v. Wisniewski (1938), 293 Ill.App. 529, 13 N.E.2d 93; First Nat. Bk. of Chicago v. Whitlock (1945), 327 Ill.App. 127, 63 N.E.2d 659; Knobloch v. Mueller (1888), 123 Ill. 554, 17 N.E. 696; People ex rel. Stead v. Spring Lake Drainage & Levee Dist. (1912), 253 Ill. 479, 97 N.E. 1042; Paine v. Doughty (1911), 251 Ill. 396, 96 N.E. 212.

The defendant also argues that because the initial pleadings in the case show that the defendants had an absolute defense to the plaintiff's claim, the June 20 consent order should be vacated as it is based upon an error of law apparent on the face of the record. Defendant's authority for this proposition is Collins v. Collins (1958), 14 Ill.2d 178, 151 N.E.2d 813. The defendant claims that case is closely analogous to the instant case. In Collins the plaintiff sought to reverse the decree of divorce she had previously obtained. The Supreme Court did vacate the decree pointing out that the original complaint in the divorce action showed that the parties had not been married long enough to allow the plaintiff to plead the statutory grounds upon which the divorce decree was granted. Collins is clearly distinguishable from the instant case in that it dealt with a decree which was a judicial determination of the rights of the parties. This is exactly the distinction the courts have relied upon to explain why consent decrees, which are not judicial determinations, are not subject to review except in very limited situations.

Finally, the facts in the instant case do not demonstrate any reason why the consent order should be vacated. The only inducement offered to the defendant to procure its consent was the settlement of the pending litigation. The defendant was represented by two competent attorneys and the suggestion that they were unfamiliar with the Illinois Mechanic's Lien Act is simply not reason enough to vacate the decree they agreed to. The allegation that the trial judge indicated his concurrence with the plaintiff's interpretation of the statute is not supported by the record. This is not a case where a layman was confused by a complicated legal

issue. The defendant was represented by two attorneys who, having access to the statute, decided to forego what they considered to be an absolute defense to the plaintiff's claim. The defendant has shown no reason why the June 20 order should be vacated.

For these reasons the decision of the trial court is affirmed.

Judgment affirmed.

Schwartz and McNamara, JJ., concur.

57863

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Petitioner-Appellee,	)	
	)	
v.	)	
	)	
LARRY ALEXANDER, a minor,	)	HONORABLE
	)	ERWIN L. MARTAY,
Respondent-Appellant.	)	PRESIDING.

PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

On June 20, 1972, a petition under the Juvenile Court Act (Ill. Rev. Stat. 1965, ch. 37, par. 702-2) was filed in the Juvenile Division alleging that the respondent, Larry Alexander, was a delinquent minor because on June 19, 1972, he committed the crime of Attempt (Rape) in that he, "a male person attempted sexual intercourse with Sherry L. Powley, not his wife, by force and against her will, in violation of chapter 38 Section 11-1." The court made a finding of fact that the respondent "approached the victim at 12:05 A.M. on June 19, 1972, in her parking lot and kept her there until 6:00 A.M. attempting to have intercourse," and found the respondent "delinquent." Subsequently, on July 19, 1972, respondent was committed to the Department of Corrections with stay of mittimus until January 24, 1973.

On appeal respondent contends that the evidence was insufficient to establish that (1) the female was not the respondent's wife; (2) the respondent took a "substantial step" toward accomplishing sexual intercourse with the female; and (3) that the attempt to have sexual intercourse was by force and against the will of the female.

Miss Sherry Powley, the complaining witness, testified for the State: She is 26 years of age. On June 19, 1972, at approximately 12:05 A.M. she had just returned from Peoria.

---

*Judge Sullivan did not participate.

Standing beside her car in the parking lot behind the Arco station at Pearson and State, and turning around to go to her apartment, she saw the respondent standing beside her saying "he wanted a ride home." She started to back away from him when he grabbed hold of her, choked her and threw her to the ground. She screamed and was told to be quiet. When she was quiet, respondent stopped choking her. While on the ground, respondent started kissing her and "put his hands all over" her. She kept fighting and struggling and when she would struggle, he would threaten to hit her and would hurt her. After a while respondent ripped off her underpants and about an hour later took off her slacks. Respondent kept kissing her and made her touch his penis. Throughout the four to five hours that respondent held her on the ground, she said she intermittently tried to struggle and talk respondent out of doing this "sort of thing." Several times respondent tried to enter her by forcing her legs apart. One time he put his finger inside of her. On another occasion respondent threatened to cut her with a nearby tin can when she wouldn't open her legs and stop struggling. When it became light, she convinced respondent to let her take him home. At the time respondent left the car she made arrangements to meet him in the same parking lot so they could go to the movies. She then went home and called the police. Respondent was arrested the next day in the parking lot where at that time she identified him to the police. Respondent never had intercourse with her.

On cross-examination Miss Powley testified that no one came in or left the parking lot and that whenever people came near, respondent held her on the ground and covered her mouth or pressed the breath out of her so she could not scream. She admitted not reporting to the police the bruises on her legs,

back and a burn mark at the top of her underwear. She never went to the hospital. She also said that it was definitely light outside when she drove respondent home.

Detective Baker, for the State, testified: On June 20, 1972, he arrested respondent in the parking lot at 13 East Pearson as he was trying to get into the automobile belonging to Sherry Powley. He advised respondent of his constitutional rights and respondent admitted he had been at the same location the night before and had forceably grabbed and tried to attack this woman. He admitted he had spent approximately four hours with her, that he took off her pants and underclothing and that he had fondled her and molested her. He also said that he had more or less taken, under duress, $14 from the victim.

On cross-examination Detective Baker said his "supplementary report" did not say that the offender admitted to the charges because he did not feel that it was necessary, and that his oral testimony at a later date would "be more than sufficient." The original report on the case was an assault and battery case report.

Respondent, Larry Alexander, testified: He lives at 5326 South State Street with his mother and father. On June 19, 1972, in the early morning hours, he was coming out of a downtown movie theatre. He had spent all his money so he walked from downtown over to the north side, sat down on some stairs and was almost sleeping when the complaining witness tapped him on the shoulder and asked him what was wrong. When he told her he didn't have money to get home, she told him he could make some money if he went over to her car in the parking lot. They got in the car and he saw that she wanted him to help her with some clothes which were in the back seat. She then said, "Let's drive around for a little while." At around 3:00 o'clock he said he thought it was time for

him to be getting home and asked her to take him home. She took him to 4510 State and before he got out she gave him her telephone number and $17. He never asked her for money; he thought she gave him her phone number because she told him to make another date with her. He denied striking or choking her, stated he did not rip off her clothes, nor force her to have any sexual intercourse nor attempt to force her. Respondent did testify to calling her for a date and to meeting her in the parking lot where he was arrested. Respondent denied making any statements or confession to the police who arrested him but said the police tried to force him to confess to raping Miss Powley. Respondent is 16 years of age. He claims he never saw complaining witness before that day.

Opinion

In People v. Walden, 21 Ill.2d 164, 168, 171 N.E.2d 650, the court stated the then existing law as follows:

> * * * [D]efendant also contends that the prosecution failed to prove that the defendant was not married to the complaining witness. We held in People v. Hornaday, 400 Ill. 361, that it was not necessary that an indictment for forceable rape allege that the complaining witness was not the wife of the defendant. Since such an allegation is not necessary in an indictment it follows that it is not necessary for the State to prove this fact.

The Committee Comments to chapter 38, paragraph 11-1, as revised in the Criminal Code of 1963, include the following brief paragraph:

> The phrase "not his wife" is added to the substantive definition of the offense. This is in accord with the traditional common law definition and case law * * *. This involves a minor change in the form of the indictment or information in Illinois rape cases. The phrase is not in the former Illinois statute and need not be negated. (People v. Hornaday, 400 Ill. 361, 81 N.E.2d 168 (1948); People v. Stower, 254 Ill. 588, 98 N.E. 986 (1912); People v. Dravilles, 321 Ill. 390, 152 N.E.2d 212 (1926). It should be negated now under section 11-1.

It appears that it was the intent of the drafters of the new Criminal Code to specifically require that the State prove the

fact that the complaining witness was not the wife of the respondent. However, the State argues the marital relation has been "negated by reasonable inference from the testimony." As proof of this proposition the State cites the following facts: the ten year difference in the age of the two persons; the complaining witness' statement that she learned respondent's name was Jerry when she drove him home; the surnames of the two are "dissimilar"; the State's Attorney addressed the complaining witness as "Miss." The circumstantial evidence here is overwhelming that the complaining witness and respondent were not married or even acquainted at the time. When the respondent was asked, "Did you ever see her before that date?" he answered, "No." Accordingly the circumstantial evidence here was sufficient to show the female was not the wife of the respondent.

Respondent argues that where the testimony of the prosecutrix alone is relied upon for a conviction, her testimony must be clear and convincing. People v. Stagg, 29 Ill.2d 415, 194 N.E.2d 342. The court there pointed out that while the credibility of witnesses is ordinarily a matter exclusively for the jury to determine, this rule does not preclude a reviewing court from considering the credibility of witnesses, particularly where a sex crime is involved where "it is relatively easy to accuse even reputable persons and sometimes difficult to become disentangled from so heinous an imputation." (At 421.)

Respondent contends that the complaining witness' testimony here presented what the court in People v. Evans, 113 Ill. App. 2d 38, 251 N.E.2d 751, called a "fantastic and incredible sequence of events." However, in that case the testimony of prosecutrix was contradicted by a barmaid, a patron of the tavern and by her own statements to the police on the evening in question. In the case at bar the complaining witness'

testimony has not been in any way impeached except by respondent's own contradictory testimony. Her story was clear, detailed, and was not shaken on cross-examination. The reason she gave for not screaming after her initial scream was that respondent prevented her from screaming and that it would have been futile. It does not seem inherently incredible that no passerby should have noticed what was going on. Given respondent's immaturity, his conduct is consistent with that of a 16 year old dealing with a woman ten years his senior who was trying to put him off his guard so his arrest could be accomplished.

Respondent urges that complaining witness' story is incredible yet asks to be believed when he testified that in the early hours of the morning he was out of money and so walked to the north side of the city when he lived on the south side.

A doctor's report of injury is not a requisite in a case of this nature, even when rape has actually been committed. People v. Jackson, 3 Ill. App.3d 303, 307, 279 N.E.2d 8.

The testimony of the complaining witness was clear and convincing. It was corroborated by the admissions of respondent to the investigating detective. The credibility of witnesses is a matter for the trier of fact, and the positive testimony of the complaining witness is sufficient to remove all reasonable doubt. People v. Triplett, 46 Ill.2d 109, 112, 263 N.E.2d 24. Respondent's use of force in the case at bar was repeated. Both his words and his actions made his intention to rape the victim absolutely clear. The fact that she, by struggling physically and using her wits over a period of several hours, prevented him from attaining his ultimate purpose, did not negate the very real force used here. The circumstances of the assault indicate the respondent's intention was to rape the complaining witness and the State proved this fact beyond a reasonable doubt. People v. Triplett.

The judgment of the circuit court is affirmed.

AFFIRMED.

Abstract only.

58032

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
vs.	)	
STANFORD W. JONES,	)	Hon. Robert J. Sulski, Presiding.
Defendant-Petitioner.	)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Stanford W. Jones, petitioner, appeals from an order sustaining the motion of the People to dismiss his petitions for relief under the Post-Conviction Hearing Act and for a writ of habeas corpus ad testificandum without an evidentiary hearing. On appeal, petitioner argues that he was entitled to an evidentiary hearing on the allegation in his post-conviction petitions that his plea of guilty was coerced and that the representation afforded him at the post-conviction proceedings was inadequate.

On April 15, 1970, petitioner entered a plea of guilty to the charge of Theft (Ill.Rev.Stat. 1969, ch.38, par.16-1.) During the hearing in aggravation and mitigation, it was disclosed that petitioner had been convicted of forgery in 1967 and had received a sentence of one year to one year and one day. Petitioner was sentenced on the theft charge to a term of one year to two years in the penitentiary. On July 16, 1970, October 29, 1970, November 12, 1970 and March 23, 1971, petitioner filed pro se post-conviction petitions and a petition for a writ of habeas corpus ad testificandum. The gist of the petitions was that in 1967 petitioner was coerced into entering a plea of guilty by threats from the assistant State's attorney

that if he did not enter a plea of guilty he would be placed in County Jail on the same tier as Mr. Sulton, against whom petitioner had previously testified. Petitioner also alleged that he was denied a hearing in mitigation after his plea of guilty in 1970 and was not permitted to bring forth the facts of his 1967 conviction. On April 20, 1971, the State's motion to dismiss petitioner's pro se post-conviction petitions and petition for writ of habeas corpus ad testificandum was granted. Petitioner appealed to the Supreme Court, which transferred the case to this court.

Petitioner first argues that he was entitled to an evidentiary hearing on the allegation in his post-conviction petitions that his plea of guilty was coerced when the assistant State's attorney informed him that if he did not enter a plea of guilty, he would be placed on the same tier as Mr. Sulton, against whom petitioner had previously testified. This allegation of coercion related to the plea of guilty entered by petitioner in 1967. Petitioner, at the time of the filing of the post-conviction petitions, was incarcerated on the charge of Theft, based upon a plea of guilty entered in April, 1970. The scope of the post-conviction proceedings is limited to a substantial denial of constitutional rights in the proceedings which resulted in petitioner's conviction. (Ill.Rev.Stat. 1971, ch.38, par.122-1.) The allegation of a violation of constitutional rights of petitioner in connection with his previous plea of guilty entered to another charge several years earlier cannot properly be maintained in the present post-conviction proceedings. The only matters which may be considered in the present post-conviction petitions are those pertaining to the original finding and judgment of guilty for the crime of Theft upon which

petitioner is presently incarcerated. People v. Calhoun, 46 Ill.2d 49, 63, 64, 263 N.E.2d 69; People v. Woods, 10 Ill. App.3d 6, 293 N.E.2d 633.

Petitioner, in his post-conviction petitions, also alleged that he was denied an opportunity to present evidence in mitigation after his plea of guilty in 1970 as to the facts surrounding his prior conviction in 1967. This contention raises no substantial constitutional question. The failure to conduct a hearing in aggravation and mitigation does not present a substantial constitutional question and may not be raised in post-conviction proceedings. People v. Scott, 49 Ill.2d 332, 274 N.E.2d 39; People v. Lee, 5 Ill.App.3d 421, 283 N.E.2d 740; People v. Blewett, _____Ill.App.3d_____, _____N.E.2d_____, (No. 58035, decided May 24, 1973.)

Petitioner's last contention is that the representation afforded him at the post-conviction proceedings was inadequate. Petitioner bases this claim upon the fact that the petitioner's allegation of coercion was not argued by counsel at the post-conviction proceedings. We have held petitioner's claim of coercion in his 1967 conviction could not be properly raised in the present post-conviction proceedings. The failure of counsel to argue the coercion issue does not demonstrate inadequate representation. In the case at bar, the record affirmatively shows that the attorney appointed to represent petitioner did consult with him, did examine the trial record, did vigorously argue the petition and did prepare an amended petition. Appointed counsel has complied with all the requirements of People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566. We find that petitioner had adequate representation in the post-conviction proceedings. People v. Sullivan, 6 Ill.App.3d 814, 286 N.E.2d 605; also People v. Frank, 48 Ill.2d 500, 505, 272 N.E.2d 25.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

*Mr. Presiding Justice Joseph Burke did not participate.

57168

PEOPLE OF THE STATE OF ILLINOIS,	)
	)APPEAL FROM THE
Plaintiff-Appellee,	) CIRCUIT COURT OF
	) COOK COUNTY
vs.	)
	)
WILLIAM A. MARSHALL,	)HON. ARTHUR L. DUNNE,
	)JUDGE PRESIDING.
Defendant-Appellant.	)

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

William A. Marshall, the defendant, was charged by indictment with gambling in violation of section 28-1 of the Criminal Code (Ill.Rev.Stat.1963, ch.30, par.28-1), and with jumping bail. At his trial on November 22, 1971, he pleaded guilty to both charges and was sentenced to serve two years probation on each charge, the sentences to run concurrently.

The sole issue on appeal is whether the trial court's admonition to the defendant, prior to its acceptance of the guilty pleas , was sufficient to meet the requirements of Supreme Court Rule 402. (Ill.Rev.Stat.1971, ch. 110A, par. 402.) The court advised the defendant of the sentences which could be imposed under the felony provisions of the gambling and bail jumping statutes, but did not advise him as to the sentences which could be imposed under the misdemeanor provisions of these statutes. Because of this he contends that he was not fully apprised of the possible consequences of his guilty plea and that therefore it was not knowingly made.

This contention is without merit. The record reflects that the court advised the defendant that if he pleaded guilty to the gambling charge he could be sentenced to not less than one nor more than five years in the penitentiary or fined up to $5000. It also advised him that he could receive the same sentence on the bail jumping charge and that therefore the

total sentence could be not less than one nor more than ten years in the penitentiary or a fine of $10,000. In each instance the defendant indicated that he understood. Following this the court advised the defendant that it was amenable to putting him on probation and that if he pleaded guilty he would be sentenced to two years probation on each charge, the sentences to run concurrently. The defendant stated that he understood this and that he desired to plead guilty, whereupon the court accepted his plea.

Under these circumstances we can hardly say that the court's admonition was insufficient to warn the defendant of the consequences of his plea. The defendant was aware of the maximum and minimum sentences possible, as well as the precise sentence which he would receive. It is ludicrous to suggest, as the defendant now does, that had he been informed of the sentences possible under the misdemeanor provisions of the statutes his plea might have been different. His willingness to plead guilty in view of the possible felony sentences surely would not have been affected by an awareness of the lesser misdemeanor sentences. Moreover, it is apparent from the record that the defendant knew from the outset that the conference between his counsel, the state's attorney and the court had resulted in the understanding that he was to be placed on probation and that he pleaded guilty on the strength of this knowledge.

The purpose of Rule 402 is to give the defendant a realistic picture of what could happen to him as a result of his guilty plea. We are satisfied that the court's admonition was

sufficient to accomplish this and that it substantially complied with the requirements set forth in the rule. The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DIERINGER AND JOHNSON, JJ.,

CONCUR.

(Abstract only)

57368

13 I.A.3 642

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.	)	
	)	
MICHAEL HUNTER,	)	HON. RICHARD J. FITZGERALD,
	)	JUDGE PRESIDING.
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

This is an appeal from the sentencing of defendant, Michael Hunter, to five to ten years in the Illinois State Penitentiary on a conviction for armed robbery after the revocation of his probation.

On February 24, 1970, defendant pled guilty to a charge of armed robbery. After a hearing on aggravation and mitigation, the court sentenced the defendant to five years probation with the first year to be served in the House of Correction. In granting probation, the court commented that if defendant violated his probation, a five to ten year sentence would be imposed.

On February 26, 1971, a rule to show cause why defendant's probation should not be terminated was filed, charging that defendant had violated his probation by being convicted in Municipal Court of two misdemeanors, for which he received concurrent five month sentences.

On December 16, 1971, a hearing was held to determine whether defendant had violated his probation. Certified copies of defendant's convictions for battery and theft were admitted into evidence. In addition, the complaining witness, Benjamin Minkus, testified that defendant and two other boys struck him and took certain of his property. Defendant testified in his own behalf and denied any involvement in the incident. After

hearing the evidence, the court found defendant in violation of his probation.

In aggravation, the State advised the court that Mr. Minkus, the complaining witness, was 73 years of age and alleged that the complainant had been "brutalized and harassed" by the defendant. In mitigation, it was shown that defendant was 18 years old. He had lived in Chicago all of his life and prior to his arrest was living with his mother. Although unemployed, he was making plans to attend Malcolm X College.

On appeal, defendant contends that (1) the trial judge lacked sufficient information regarding defendant's background to sentence him appropriately; (2) the sentence imposed punished defendant for acts committed during the period of probation, as well as for the original offense and (3) the sentence imposed was excessive.

Defendant first contends that the trial judge lacked sufficient information regarding defendant's background to sentence him appropriately. We disagree. The record reveals, and defendant admits, that the trial court had before it a pre-sentence investigation report which had been prepared with reference to an unrelated case. This report describes in detail the defendant's family background, educational level and arrest record. In addition, defense counsel had ample opportunity to present evidence of defendant's background in mitigation. He stated that defendant was 18 years old and lived with his mother. He also stated that although defendant was unemployed, he planned to attend college.

Chapter 38, Ill.Rev.Stat.1969, Par. 1-7(g) provides:

> For the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense.

We think the trial court adequately conformed to this provision and had sufficient information regarding defendant's background to sentence him appropriately.

Defendant next contends that the sentence imposed punished defendant for acts committed during the period of probation, as well as for the original offense. Defendant bases this argument on the fact that the State originally recommended a two to three year sentence in the penitentiary. The record reveals, however, that the trial court, in granting defendant probation, warned him that if he violated probation, he would receive five to ten years. This comment clearly indicates that the trial judge was merely adhering to his original judgment when he sentenced defendant to five to ten years on the revocation of his probation, and not punishing defendant for acts he committed while on probation.

Finally, defendant contends that the sentence imposed was excessive. Defense counsel argues that defendant was only 18 years of age and capable of rehabilitation. The trial judge heard the evidence in aggravation and mitigation and sentenced the defendant to a term within the statutory limitations. Ch.38, Ill.Rev.Stat.1969, par.18-2. We think the sentence was commensurate with the nature of the offense of armed robbery and with the defendant's criminal background. The record shows that

defendant's conviction for armed robbery occurred while he was on probation for a prior conviction for armed robbery and attempt rape. It also reveals that the defendant was convicted for theft and battery less than one year after being granted probation on the armed robbery conviction. It is well settled that a reviewing court should not modify a sentence unless it is manifest that it is excessive. People v. Winters, 1 Ill. App.3d 533, 275 N.E.2d 220. We cannot say that this is such a case.

The judgment of the Circuit Court will therefore be affirmed.

AFFIRMED.

DIERINGER AND JOHNSON, JJ.,
CONCUR.
(Abstract only)

58433

PEOPLE OF THE STATE OF ILLINOIS,	)
	)
Plaintiff-Appellee,	)APPEAL FROM THE
	) CIRCUIT COURT OF
vs.	) COOK COUNTY
	)
DENNIS SZUDY,	)
	)HON. HERBERT C. PASCHEN,
Defendant-Appellant.	)JUDGE PRESIDING.

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

The defendant, Dennis Szudy, was charged with rape. He pleaded guilty and was sentenced by the Circuit Court of Cook County to not less than eight nor more than twenty-five years in the penitentiary.

On November 5, 1970, the defendant filed a petition for a post conviction hearing in which he asserted that his trial counsel did not represent him adequately and that the trial court failed to admonish him properly before accepting his guilty plea. Affidavits of the defendant's mother, father and cousin were filed in support of the petition. These affidavits were unrelated to the allegations in the petition and stated in substance that each affiant had been present along with the defendant in the hall outside a courtroom in the criminal court building and had heard the defendant's counsel tell him that an arrangement had been made with the State's Attorney whereby the defendant would receive a sentence of from three to five years in the penitentiary if he pleaded guilty.

The State moved to dismiss the defendant's petition and filed in support of its motion, affidavits of the defendant's counsel, his associate, and the State's Attorney to the effect that no such agreement had been reached and no such representation had been made to the defendant. After a hearing at which the court

considered the affidavits filed by both parties, it denied the petition. The defendant appealed directly to the Supreme Court pursuant to section 122-7 of the Criminal Code (Ill.Rev.Stat.1969, ch. 38, par.122-7), and the Supreme Court transferred the cause to this court for disposition.

The sole issue on appeal is whether the court erred in denying the defendant's petition without an evidentiary hearing.

After reviewing the record we conclude that the trial court acted properly. The allegations in the defendant's petition that he was inadequately represented and improperly admonished by the trial court were conclusory in nature. No specific facts were set forth. It is well established that allegations which amount to mere conclusions are not sufficient to require an evidentiary hearing. (People v. Heaven, 44 Ill.2d 249.)

It is true that the affidavits filed by both sides created a controversy as to whether the defendant had been made to understand that he would be sentenced to three to five years if he pleaded guilty. However, in our opinion, an evidentiary hearing would have added nothing to the information already before the court in the affidavits. The Post Conviction Hearing Act gives the court wide discretion as to the type of evidence it may receive. (People v. Humphrey, 46 Ill.2d 88.) It may receive proof by affidavits, depositions, oral testimony or other evidence. (Ill.Rev.Stat.1971, ch. 38, par. 122-6.) An evidentiary hearing is not required in all cases, and where feasible the court may resolve controverted issues of fact upon affidavits and the trial record itself. (People v. Derengowski, 44 Ill.2d 476; People v. Cummins, 414 Ill.308; People v. Ramme, 4 Ill.App.3d 386.)

In the present case the record indicates that the court admonished the defendant at the time of sentencing that he could be sentenced to the penitentiary for any number of years, not less than one. The State's Attorney recommended a sentence of from fifteen to thirty years, and the defendant's own counsel recommended a sentence of seven to fifteen or eight to twenty. The defendant was present during these proceedings and raised no objection. Under these circumstances we cannot say that the trial court abused its discretion in reaching a decision on the basis of the affidavits and record.

For the foregoing reasons the judgment of the Circuit Court of Cook County denying the defendant's petition for post conviction relief is affirmed.

AFFIRMED.

DIERINGER AND JOHNSON, JJ.,
CONCUR.
(Abstract only)

13 I.A.3 671

No. 72-317

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MID-ILL TRUCK EQUIPMENT COMPANY, Plaintiff-Appellant,	Appeal from the Circuit Court for the Third Judicial Circuit of Illinois, Madison County.
v.	The Honorable William E. Johnson, Judge Presiding.
LYLE TATUM, Defendant-Appellee.	

MR. PRESIDING JUSTICE EBERSPACHER delivered the opinion of the court:

The plaintiff, Mid-Ill Truck Equipment Company, appeals from a judgment rendered in favor of the defendant, Lyle Tatum, in a contract action brought in the small claims division of the Circuit Court of Madison County.

There are no significant disputes as to the facts of this cause as the defendant was the only witness having been called as an adverse witness under the provisions of Ill.Rev.Stat. Chap. 110, §60, by the plaintiff. The defendant purchased from the plaintiff certain mechanic and hydraulic equipment for attachment to a truck owned by the defendant. The total purchase price of the equipment was $1199.63 of which the defendant paid $899.63. Defendant then refused to pay the remaining balance of $300 contending that the equipment did not operate correctly. The plaintiff filed suit and the defendant appeared with counsel. The matter was tried to the court and the court found in favor of the defendant. The court's order denying reconsideration states, "Plaintiff having requested reasons for decision for basis of appeal, the court found in this case, that plaintiff failed to meet the burden of proof to sustain his complaint and [illegible]er that there was failure of fulfillment on alleged contract."

Plaintiff presents two issues for review by this court: 1) Is partial failure of consideration or performance on the part of the plaintiff a complete defense to

his claim? 2) Must such partial failure in a small claims case be pleaded as an offset?

Before considering the issues presented by the appellant, we note that the defendant appellee has failed to file a brief in this case and that we could reverse the cause because of the failure of the appellee to file. (Logan Furniture Mart, Inc. v. Davis, 8 Ill.App.3d 150, 289 N.E.2d 228.) However, we note the amount of dollars in controversy and considering the possible costs of this appeal and for that reason shall proceed to consider the question on the merits. In re the Estate of Kunz, 7 Ill.App.3d 760, 288 N.E.2d 520.

In an attempt to deal with the issues presented in a logical manner we shall first consider the second issue presented by the appellant.

The appellant contends that the issue of partial failure of consideration must be plead and cites as authority Farrar & Wheeler v. Toliver, 88 Ill. 408 (1878). A reading of the case which involves a suit to collect on certain promissory notes given as consideration for an exclusive sales territory does not support the appellant. The court reversed on the basis of failure of proof, not on the insufficiency of pleadings.

Ill.Rev.Statute, Chapter 110A, §286 provides in part, "* * * If the defendant appears, he need not file an answer unless ordered to do so by the Court; and when no answer is ordered the allegations of the complaint will be considered denied and any defense may be proved as if it were specifically pleaded". (Emphasis ours.) We can but construe the statute according to a plain reading of the words contained therein. There is no burden upon the defendant to plead the allegation of partial failure of consideration in Small Claims Court.

The first issue presented by the appellant stated in the negative is, partial failure of consideration or performance is not a complete defense to an action on a contract. With this contention we agree. (Merchants Loan & Trust Company v. Unmach, 228 Ill.App.67.) 17 A. C.J.S. Contracts, §583 states, "* * * a party who alleges a partial failure of consideration as a defense must prove the extent to which the consideration has failed." See also Dunn v. Hoefer, 5 Ill.App.3d 793,

284 N.E.2d 1, a case on a contract, wherein the defendant brought a counterclaim for damages. The court found that there was no basis for the award of damages to plaintiff and in reversing the trial court stated at 5 Ill.App.3d p. 795, "The element of damages, as any other necessary element, must be alleged and proved. The record herein fails to establish any basis or proof for the award allowed. We therefore remand this cause with directions to conduct a hearing to establish the proper amount of plaintiff's damages."

These words seem to be appropriate for the case at hand, in which defendant's damages are not supported by the evidence. The transcript as presented to this court has several voids wherein the recording apparatus was not sufficient to its task and thus we cannot from the record determine any basis for the award of the $300 offset to the defendant.

The decision of the court is therefore reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

CONCUR: /S/ Caswell J. Crebs

CONCUR: /S/ Charles E. Jones

PUBLISH ABSTRACT ONLY

57045

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
v.	)	
HAROLD L. JACKSON,	)	HONORABLE JAMES M. BAILEY, PRESIDING.
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE DRUCKER delivered the opinion of the court:

The defendant was indicted on four counts of attempt to commit murder (Ill. Rev. Stat. 1969, ch. 38, par. 8-4). A jury returned four verdicts, two of which found the defendant not guilty and two of which found the defendant guilty of the attempt to commit the murder of police officers Beilke and Crotty. Judgments were entered on both guilty verdicts, but defendant was given only one sentence of five to 15 years.

On appeal he contends that: (1) the court erred in receiving into evidence a prejudicial photograph which lacked probative value; and (2) the evidence failed to prove him guilty beyond a reasonable doubt.

The facts are as follows: On the night of July 8, 1970, officers Jeffrey Beilke and John Crotty of the Chicago Police Department were on patrol on Stony Island Avenue in an unmarked car. They were dressed in civilian attire. Both policemen testified that upon hearing gunfire, they turned their car into 66th Street, the area from which they thought the shooting was coming. While driving west on 66th Street the officers saw four men carrying rifles or shotguns disappear into an alley. Crotty and Beilke, after putting in a call for assistance, got out of their car to search for the men. They were unable to find them. At this time Crotty and Beilke saw a squad car turn from Stony Island Avenue onto 66th Street and proceed slowly toward them. Although the area was dark due to the fact that the street lights

were not operating, both officers testified that they saw a youth standing in front of the lighted vestibule of an apartment building located at 1526-28 East 66th Street. They stated that as the squad car passed in front of him, the youth fired several shots in its direction. It was the testimony of the officers that the light from the vestibule shining through the doorway was sufficient for them to discern that the gunman was a young Negro wearing a light bush jacket and dark trousers.

After the gunman had fired in the direction of the passing police car, Beilke and Crotty ran toward him, calling upon him to halt. They testified that the man, whom they identified as the defendant, turned toward them and fired two shots. He then ran into a gangway beside the building. The two officers pursued him. When they reached the rear of the building, they saw the defendant running back toward them. According to Crotty and Beilke, the defendant threw two guns which he was carrying into a basement well. While Beilke retrieved the guns, Crotty grabbed the defendant as he tried to run past him. Crotty testified that with the help of other officers he subdued the defendant, handcuffed him and led him out of the gangway.

Crotty testified that during the time it took to capture the defendant, between 50 and 70 rounds of gunfire were heard in the neighborhood. Both Crotty and Beilke testified that due to the continued shooting the police were ordered to clear the area. No search was made for shell casings ejected from the defendant's gun.

Beilke then testified that after his arrest the defendant was taken to the Jackson Park Hospital. The police had a report that there was a gunshot victim at the hospital and Beilke stated that he wanted to see if he had been wounded by the same kind of gun as those which Jackson carried. It was learned that the gun

used in the prior shooting was different. The defendant was not treated for injuries at this time.

Jackson was taken from the hospital to the Third District Police Station. After arriving at the station he was ordered to be returned to the hospital where he was examined. Medical testimony introduced by the defendant indicated that the examining physician found a small scar on his face and abrasions on his chest and back. Jackson's only treatment was the administration of a tetanus shot.

Officer Michael Bobko of the Chicago Police Department testified that he was riding in the squad car which was fired upon. Bobko stated that he saw a young Negro male wearing a light colored bush jacket and dark trousers, standing in front of a well lighted vestibule, fire two pistol shots at the car. The muzzle blasts from his assailant's guns sufficiently illuminated the man's face to enable Bobko to identify him as the defendant. Bobko pursued him into the gangway. There he saw officer Crotty grab the defendant as he attempted to run past. Bobko testified that while in the gangway he saw a middle aged Negress on the back porch of the 1526 East 66th Street building. He stated that she was shouting but that he could not understand what she was saying. Bobko told her to get back into her house because shots were being fired in the area.

Officer Herbert Wehrs, the driver of the squad car, testified that he saw a man dressed in an off-white coat level two pistols in the direction of the auto and fire two shots. He stated that after stopping the car he ran toward the gangway. He there saw officers Beilke, Crotty and Bobko emerge with the man in the white coat. This man he identified as the defendant, Harold Jackson.

The defendant did not testify in his own behalf. He did

call, however, Mrs. Elvira Grover, a resident of 1526 East 66th Street. Mrs. Grover testified that when on the night of July 8, 1970, she heard gunfire in the neighborhood, she telephoned the defendant and carried on a short conversation with him. She stated that within five minutes of her call she saw two men running down 66th Street and heard gunshots. Almost immediately thereafter she heard knocking on her back door and then a cry of "halt." When she walked onto her back porch, Mrs. Grover testified that she saw three policemen beating the defendant. She called upon them to stop. They responded that he had been shooting at them.

On this evidence the jury found the defendant not guilty of the charge of attempted murder of officers Bobko and Wehrs, the policemen in the squad car, but found him guilty of that crime with regard to the shots fired at officers Beilke and Crotty.

Opinion

Defendant's first contention is that the introduction into evidence of a photograph of the doorway of the 1526-28 East 66th Street building,which purported to depict the scene of the shooting,lacked probative value and was highly prejudicial. Officer Bobko testified that the photo depicted the location where Jackson was standing when he saw his face. Over defense objections the photo was allowed into evidence by the court as being "necessary."

Defendant's claim of lack of probativity lies in the fact that during the interval between July 8 and the time that the picture was taken, certain windows in the doorway had been replaced by wooden boards. He contends that the only issue to which the photo relates is whether sufficient light could shine through the panes of glass to illuminate the defendant's face on the darkened street. This he claims could not be

determined by viewing a photo of the doorway in its altered condition. He further contends that the introduction of this photo improperly linked him with the notorious street gang, the Blackstone Rangers. This was due to the fact that the legend "Stones Run It" scrawled across the front of the building was clearly visible in the photograph. Jackson asserts that the inflammatory nature of this legend was aggravated by the State's attempt to connect him with Jeff Fort, who was cited in news items as being the leader of the Blackstone Rangers.

The admission of relevant photographs into evidence is within the discretion of the trial court. Exercise of that discretion will not be interfered with unless it has clearly been abused. People v. Nicholls, 42 Ill.2d 91, 99, 245 N.E.2d 771; People v. Speck, 41 Ill.2d 177, 203, 242 N.E.2d 208. There was no such abuse in the case at bar. Illinois has long allowed the introduction of photos to assist juries in visualizing the scene of a crime. People v. Allen, 17 Ill.2d 55, 62, 160 N.E.2d 818; People v. Rogers, 16 Ill.2d 175, 181, 157 N.E.2d 28. Here, although some features of the scene had been altered, the introduction of the photo falls within the Allen - Rogers rule. Officer Bobko testified when the photograph was introduced that the glass in the doorway, unbroken at the time of the shooting, was depicted half covered with boards. The discrepancy between the scene portrayed in the photograph and the conditions as they were on the night of the crime were not so great as to rob the picture of its probative value. The jury could determine how the doorway appeared on the night of July 8 and what opportunity it would have afforded light to shine out to the darkened street where the defendant was standing.

The probative value of the photograph was not overborne by prejudice to the defendant. The picture did not establish a link between the defendant and the Blackstone Rangers nor was an attempt made by the State to do so. Jackson contends that the introduction of Jeff Fort's name into the proceedings bolsters his claim of prejudice in this regard. This contention is without merit. The record reveals that the entire exchange concerning Fort consisted of the following dialogue between the assistant state's attorney and officer Beilke dealing with the defendant's first trip to the Jackson Park Hospital:

> Q. Did you have any occasion to have any conversation with anybody in the presence of the defendant at this time and place?
>
> A. I did.
>
> Q. And who was that person?
>
> A. Jeff Fort.
>
> Q. And what if any conversation took place?

At this point defense counsel requested a conference in chambers. The result of this conference was a ruling excluding any further mention of Jeff Fort and an instruction to the jury to disregard the answer in which that name was mentioned. Thus all testimony concerning Fort was precluded at the initiative of the defense counsel. No showing was made that Fort was generally known in the community as the leader of a street gang; the defendant has merely alleged this. Furthermore, the truncated exchange concerning Fort did not demonstrate a clear alliance between Jackson and him. Curative instructions have been held to be sufficient to shield a defendant from bias in cases where improper testimony had directly linked him to criminal activities. People v. Dell, 77 Ill. App.2d 318, 326, 222 N.E.2d 357. Certainly, then, the curative instructions given here adequately protected the defendant from prejudice.

Defendant next contends that the evidence did not prove him guilty beyond a reasonable doubt. He argues essentially three points in support of this contention: (1) The testimony of the police officers was incredible and was impeached by the defense alibi witness; (2) the State failed to prove the requisite intent needed to sustain a finding of guilt on a charge of attempted murder; and (3) the jury returned inconsistent verdicts.

Jackson first complains that (1) the story told by the police officers was incredible due to their failure to collect physical evidence in its support; (2) the actions of the police were such that they had reason to manufacture a false account of the events of July 8; and (3) their testimony was impeached by an alibi witness.

It is the function of a jury and not a reviewing court to weigh the credibility of witnesses. Only when the evidence is so unsatisfactory as to leave a reasonable doubt of defendant's guilt will the jury's determination be disturbed. People v. Hampton, 44 Ill.2d 41, 45, 253 N.E.2d 385.

The State presented four eyewitnesses who identified the defendant as the gunman who had been standing in the doorway on 66th Street. The defendant claims that this testimony is discredited due to the failure of the police to search for spent cartridges ejected from Jackson's pistols. The defendant mistakenly relies on People v. DiVito, 66 Ill. App.2d 282, 214 N.E.2d 320, and People v. Nitti, 312 Ill. 73, 143 N.E. 448, for support of this proposition. In DiVito it was held that a defendant could not be convicted for burglary solely on the basis of fingerprint evidence where the State failed to show that the fingerprints were not the products of a prior social visit to the scene of the crime. In Nitti the issue of physical evidence was barely discussed although in dicta the court

chastised the prosecution for failing to demonstrate that a body discovered by the deputy sheriff was the body of the man for whose murder the defendant had been charged. In the instant case conviction was based upon the testimony of eyewitnesses. Furthermore it was explained by the State's witnesses that their failure to search for physical evidence immediately after taking Jackson into custody was due to continued sniper fire in the neighborhood.

Defendant next claims that the police concealed the fact that he was injured as a result of a beating they inflicted upon him. This claim is without merit. Jackson produced no evidence which conclusively demonstrated that the police had beaten him. The origin of the slight injuries which he suffered are as easily attributable to the struggle which the State's witnesses said attended his capture as to a deliberate police beating. The failure of the police to comment on Jackson's injuries is not proof of an attempt to conceal them. The record reveals that they were never questioned about this matter. No inferences can be drawn from the failure of a witness to answer a question (People v. Barksdale, 130 Ill. App.2d 103, 108, 266 N.E.2d 516) that was never asked. Furthermore, there is no indication that any of these men had direct knowledge as to the extent of defendant's injuries. It does not appear in the record that Jackson was accompanied to the hospital for treatment by any of the four officers.

Defendant claims that his attempted alibi "witness," Mrs. Grover, effectively impeached the credibility of the four police officers who testified for the State. Mrs. Grover stated that shortly after her telephone conversation with the defendant she appeared on her back porch to plead with police who were beating him in the gangway below her. Officer Bobko, whose testimony

relates most directly to this incident, stated that he saw a middle aged Negro appear briefly on the back porch. Bobko testified that he told her to return to her house because of the continued gunfire in the neighborhood. He said that she did this immediately.

It is for the jury and not a reviewing court to determine the weight to be given alibi testimony. Its mere presence does not obligate the trier of fact to disregard prosecution evidence to the contrary nor will this court substitute its judgment for a jury's solely because the evidence is in conflict. People v. Brown, 52 Ill.2d 94, 285 N.E.2d 1; People v. Soukup, 41 Ill.2d 94, 242 N.E.2d 158. We are not presented with a record which would necessitate our taking this drastic step. Here the defendant was caught in the act, his apprehension coming only seconds after the police officers were fired upon. Defendant cites People v. Ricili, 400 Ill. 309, 79 N.E.2d 509, and People v. Gooden, 403 Ill. 455, 86 N.E.2d 198, as instances where convictions were overturned due to the presence of alibi evidence. The factual situations presented in those cases, however, are clearly distinguishable from that with which we are confronted in the case at bar. In both Ricili and Gooden identification of the defendant was made by the complaining witness some time after the crime. Furthermore, in Ricili the witness failed to make a positive identification, while in Gooden the alibi evidence consisted of the testimony of five persons, including the defendant's physician who stated that the defendant was ill with pneumonia and consequently confined to his bed at the time of the crime. By contrast the identification of Jackson was immediate and positive. In addition, the jury could have found Mrs. Grover to be a credible witness and still returned a verdict of guilty. Whether or not he had been beaten does not bear on the issue of whether he

had committed the crime of attempted murder. The clash of testimony on this matter only creates a question as to who will be believed, a question whose answer is properly left to the jury. People v. Umphers, 133 Ill. App.2d 853, 272 N.E.2d 278; People v. Sauber, 68 Ill. App.2d 133, 214 N.E.2d 918. Indeed, Mrs. Grover's account does not provide the defendant with a complete alibi. She admitted that when she told the police to stop beating Jackson, they responded by saying that he had been shooting at them. In addition, even if she had been engaged in a telephone conversation with the defendant three to five minutes before she heard the sounds of gunfire on 66th Street, Jackson still would have had enough time to appear at the front of the same building on 66th Street and be the man who shot at the police officers.

The defendant argues that the State failed to prove the requisite element of intent needed to sustain his conviction for the attempted murder of officers Beilke and Crotty. We find that sufficient evidence was presented to the jury that their finding of guilt on this issue need not be overturned. The element of intent in a trial for attempted murder may be inferred from the circumstances surrounding the defendant's acts. Relevant circumstances in establishing intent include the character of the assault and the use of a deadly weapon. People v. Koshiol, 45 Ill.2d 573, 262 N.E.2d 446; People v. Coolidge, 26 Ill.2d 533, 187 N.E.2d 694. In the instant case Beilke and Crotty found Jackson firing two pistols in the direction of a passing squad car. When they called upon him to halt, he turned and fired a second volley of shots at them. It was for this act that he was convicted. These facts are far different from those found in People v. Henry, 3 Ill. App.3d 235, 278 N.E.2d 547, which defendant cites in support of his position. In Henry the

defendant, an expert marksman, was convicted of attempted murder for firing in the direction of a slowly passing squad car. The court held that one possessing this skill would be capable of hitting a target as prominent as a police car if he so desired, and therefore the defendant did not display an intent to kill. The jury in the case at bar (as did the court in Henry) felt that the evidence was insufficient to convict defendant on the charge that he attempted to murder the officers in the passing squad car. Clearly, however, it was proper for the jury to presume that the natural probable consequences of his firing on the two officers on foot was sufficient to manifest an intent to commit murder. People v. Taylor, 95 Ill. App.2d 130, 237 N.E.2d 797.

Finally, the defendant contends that the jury returned inconsistent verdicts and that this inconsistency manifested a disbelief of the testimony of the State's witnesses. The defendant was charged with two separate and distinct acts each of which, if proven beyond a reasonable doubt, would constitute attempted murder. The indictment alleged that he first fired at Bobko and Wehrs in their passing squad car and then turned and fired at Beilke and Crotty who were on foot. The State, therefore, had to prove the commission of two separate crimes which, though occurring within a brief interval of time, are nevertheless distinct. Defendant erroneously relies on People v. Griffin, 88 Ill. App.2d 28, 232 N.E.2d 216, to support his contention that a jury could not consistently enter a verdict of acquittal with respect to his having fired at the car and guilty with respect to his having fired at the other two officers. In Griffin the court held that a conviction for robbery could not stand where, on identical evidence, a co-defendant was acquitted. The courts in this state, however, have refused to apply the Griffin rule to cases where a single defendant is found guilty of one criminal act and

not guilty of a separate though related act. People v. Taylor, 132 Ill. App.2d 473, 270 N.E.2d 62; People v. Barnes, 118 Ill. App.2d 128, 255 N.E.2d 18; see People v. Joyner, 50 Ill.2d 302, 278 N.E.2d 756. Here the testimony of the police officers indicated that the shots fired in the direction of the slowly moving squad car went harmlessly astray. However, when Beilke and Crotty then demanded that the defendant halt, he fired at them and then attempted to escape.

It is our conclusion that on these facts the jury could consistently find the defendant guilty of the attempted murder of officers Beilke and Crotty while entertaining a reasonable doubt that he committed the same crime with regard to the officers in the squad car.

AFFIRMED.

English and Sullivan, JJ., concur.

Abstract.

72-220

13 I.A.3 766

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ, Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On August 17, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

ABSTRACT

NO. 72-220

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

IRWIN J. HESLEY, JR.,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the 18th
	)	Judicial Circuit,
v.	)	Du Page County, Illinois.
	)	
ELLEN D. HESLEY,	)	Honorable Edwin L. Douglas,
	)	Judge presiding.
Defendant-Appellant.	)	

Mr. PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

The parties in this action were married on June 29, 1967. The complaint for divorce was filed by the husband on May 26, 1971 in the circuit court of DuPage County. On December 15, 1971 the divorce was granted to the wife on her counter-complaint against her husband. The parties during the marriage had separated and had undergone nineteen months of counseling. There were no children born or adopted. Both the complaint and counter-complaint alleged mental cruelty. The wife was 54 years old at the time of the divorce.

After trial, the court ordered the counter-defendant husband to pay as a lump sum settlement in lieu of alimony the sum of $10,000 at the rate of $50 per week. The court further ordered the husband to pay the wife's attorney fees in the sum of $1000, and ordered the husband to maintain the $10,000 life insurance policy he had, naming the wife irrevocable beneficiary until the alimony was paid. The court further divided the two cars the parties owned and gave to the husband the boat which was then encumbered with a mortgage.

Defendant appeals from the decree contending the court should have awarded her periodic alimony payments in an amount commensurate with her needs, predicated upon the

income of her husband, and the circumstances of the parties. Defendant testified she was a cardiac patient and was under the frequent care of doctors and had consulted a psychiatrist.

Plaintiff testified his net earnings were $15,177 for 1970 and would be approximately that for the year 1971. Both parties had been married prior to this marriage and had children by their prior marriages. The wife testified that she needed $426 a month for living expenses and the court awarded her $50 per week for a period of approximately four years. The parties owned no real estate, had considerable debts, and owned no substantial assets other than as distributed in the decree herein.

The Divorce Act provides:

> "The court may order the husband *** to pay to the other party such sum of money, or convey to the party such real or personal property, payable or to be conveyed either in gross or by installments as settlement in lieu of alimony, as the court deems equitable." (Emphasis supplied.) Ill.Rev.Stat. 1971, ch. 40, par. 19.

In Overton v. Overton (1972), 6 Ill.App.3d 1086, 1091, 287 N.E.2d 46, 51, we stated:

> "Paraphrasing this statute it simply states that the court may order payment of periodic alimony subject to future modification or may order a definite amount of property conveyed, or the proceeds thereof paid, in lieu of alimony. The statute is in the alternative. The court may do either, but it may not do both."

The court in Overton ordered a lump sum payment payable in installments at the rate of $50 per week until the sum of $10,000 was paid. The trial court after hearing the evidence in its discretion could properly order lump sum alimony payable in installments as the court deemed proper pursuant to the above statutory provision. In Canady v. Canady (1964), 30 Ill.2d 440, 444, 197 N.E.2d 42, 44, the Supreme Court

stated:

> "Both the form of an award of alimony, and its amount, rest primarily in the discretion of the trial court."

The court went on in Canady to approve an award of alimony in gross payable over a period of eleven years. In Loeb v. Loeb (1972), 6 Ill.App.3d 892, 286 N.E.2d 790, again after making property settlement adjustments, the court held that alimony in gross in the sum of $50 a week payable for a period of four years was not an abuse of the trial court's discretion. The facts in Loeb are somewhat similar to the case before us as the marriage there was a short duration, both parties having been married before, and having children by prior marriages.

From the record we find no abuse of judicial discretion on the part of the trial judge. The trial court was in a better position than a reviewing court, after observing the witnesses and examining the documentary evidence, to properly determine the amount of alimony and to adjust the equities in the property between the parties. We will not substitute our judgment for that of the trial court as to whether or not periodic alimony or alimony in gross payable in installments was proper.

We affirm the decree entered by the trial court.

AFFIRMED.

THOMAS J. MORAN, J., and SEIDENFELD, J., concur.

72-103

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ, Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On August 21, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 72-103

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BETTY BURHENN, Plaintiff-Appellant,	)	Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Lee County, Illinois.
v.	)	
WALTER A. KYGER and SHIRLEY M. KYGER, Defendants-Appellees.	)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

This action, for personal injuries allegedly sustained as a result of defendants' wilful and wanton misconduct, was brought to trial before a jury. At the close of the case-in-chief, the court directed a verdict for defendants; plaintiff appeals.

Plaintiff and defendants were friends and neighbors for ten years. During the morning of February 11, 1971, plaintiff visited defendants' home on three occasions, each time using the rear entrance. On departing after her last visit, she stepped out the back door, her right foot hit a patch of ice and she slipped and fell on the porch.

The propriety of the trial court's directed verdict must be tested by the rule in Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 510 (1967). A review of the evidence most favorable to plaintiff shows, by her testimony, that immediately after falling and while on her back, she noticed water dripping from a hole in the eaves trough, forming the ice patch upon which she had slipped. In evidence were photographs, taken

four days after the occurrence, which depicted such a hole and a patch of ice or water; plaintiff testified that the same conditions existed on February 11. After the fall, plaintiff returned to her home, telephoned her husband and then phoned the defendants. Mrs. Kyger testified that, upon receiving the call, she immediately checked the porch and, while there may have been water, there was no ice.

The essence of a wilful or wanton injury is that it "must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness, or carlessness when it could have been discovered by the exercise of ordinary care." Hocking v. Rehnquist, 44 Ill. 2d 196, 201 (1969). Further, an occupant of premises does not have a duty to licensees to discover unsafe conditions thereon, although he is under a duty to disclose or warn against hidden dangers of which he has knowledge. Schoen v. Harris, 108 Ill. App. 2d 186, 191 (1969); Hessler v. Cole, 7 Ill. App. 3d 902, 906 (1972). In the present case, there was no showing that defendants intended plaintiff's injury, that they had any knowledge of an icy condition, or that the condition was hidden.

Finding, under the rule of Pedrick, supra, that the directed verdict was proper, we affirm the trial court.

Judgment Affirmed.

GUILD, P.J. and SEIDENFELD, J. - Concur

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield.

PRESENT

[illegible] ..... Presiding Judge

[illegible] ..... Judge

[illegible] ..... Judge

Attest: ROBERT L. CORN, Clerk.

BE IT REMEMBERED, that to-wit: On the [illegible] day of August A. D. 19[illegible], there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

General No. 11914 Agenda No. 13-152

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs	)	Appeal from
	)	Circuit Court
HOWARD WILSON,	)	Sangamon County
	)	
Defendant-Appellant	)	

MR. JUSTICE SIMKINS delivered the Opinion of the Court:

On January 20, 1972, the grand jury returned a two count indictment which charged the Defendant-Appellant Howard Wilson, Jr. with Theft over $150. On April 11, 1972, the defendant, pursuant to the terms of a negotiated plea, entered his plea of guilty on Count I to the lesser offense of Theft under $150. Count II was dismissed on motion of the State's Attorney. Defendant was sentenced to one year at the State Level Farm at Vandalia, the sentence to run concurrently with a sentence which defendant was then serving.

The defendant was discharged from the Illinois Department of Corrections on January 9, 1972, having served the sentence then imposed.

The Illinois Defender Project moves to withdraw as counsel for defendant, and proceeds in the manner prescribed in conformity with Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396). The record shows proof of service of the motion and brief upon defendant. The motion was continued to enable defendant to file additional submissions in response of the opportunity given to him. None were filed.

We have examined the record. In substantial compliance with the pertinent provisions of Supreme Court Rule 604, We agree that the record discloses no justiciable issue for review and that the appeal is frivolous and without merit. Accordingly, the motion of the Illinois Defender Project to withdraw as defendant's counsel is allowed, and the judgment is affirmed.

Judgment affirmed.

Smith, P.J., and Trapp, J. concur.

General No. 12177 Agenda No. 13-1A

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

MAX BURNSTINE, Plaintiff-Appellant, vs. CHARLES HAGAMAN, Defendant-Appellee	Appeal from Circuit Court Stephenson County

MR. JUSTICE SIMKINS delivered the opinion of the Court:

The plaintiff-appellant Max Burnstine filed a small claims complaint seeking damages from the defendant-appellee Charles Hagaman. The defendant did not appear on the return date which was August 4, 1971, was defaulted and the court entered a judgment in favor of the plaintiff in the amount of $230.30. On September 10, 1972, citation to discover assets was returned showing service by the sheriff. Hearing on the citation was set for September 29, 1972. On that date the defendant appeared by counsel and was granted leave to file motions. On November 6, 1972,

the defendant filed his Motion to Vacate the judgment. On November 29, 1972, the plaintiff filed a Motion to Strike defendant's motion. On January 4, 1973, the Motion to Strike was denied and the Motion to Vacate the judgment was allowed and continued for hearing. Plaintiff appeals from these orders.

The appellee has not filed a brief in support of his orders entered in his favor and this places the reviewing court in the role of advocate to sift the issues. (Spinelli 23 Ill.App.2d 391, 227 N.E.2d 770.) It is clear that lack of appearance by the appellee results in reversal of the judgment with no discussion of the merits. It is also true that if it would be manifestly unjust to reverse pro forma the court, in its discretion, can consider the appeal on its merits. After examining the record and the issues presented, we have determined that pro forma reversal is the appropriate action. (Spinner v. Kathman 3 Ill. App.3rd 493, 281 N.E.2d 384.)

Accordingly the order denying the Motion to Strike is reversed and the order vacating the judgment is reversed.

Judgments reversed.

Craven, P.J., and Trapp, J. concur.

13 I.A.3 870

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE HAROLD F. CRAPP, Judge

HONORABLE LELAND SIMON, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 23rd day of August A. D. 1973, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12144 Agenda 73-114

People of the State of Illinois, Plaintiff-Appellee, vs. Bobbie Jean Davis, Defendant-Appellant.	Appeal from Circuit Court Champaign County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

Defendant entered a plea of guilty to a charge of theft of property under $150. After a hearing, defendant's motion for probation was denied. After a hearing in aggravation and mitigation, defendant was sentenced to a term of not less than 1 year nor more than 3 years. Defendant appeals the sentence imposed. Defendant contends the sentence should be vacated; that she should be resentenced under the Unified Code of Corrections, or in the alternative, that probation should be granted.

Defendant's conviction arises out of the theft of five stereo tape cartridges and two pairs of baby shoes from Bayre's Department Store, Champaign, Illinois, on October 26, 1971. She was charged by indictment for her second violation of Illinois

Revised Statutes, 1969, chapter 38, paragraph 16-1. The parties agree that defendant's plea was the result of negotiations in which the guilty plea was given in exchange for a dismissal of other charges pending. The state consented to follow the recommendations of the probation report, or in the event probation was denied, to recommend a sentence of 1 to 3 years. The probation report recommended that probation be denied.

As to defendant's contention that this court order probation, we find that People ex rel Ward v. Moran (S.Ct.Gen. No. 45197 (1973)), _____ Ill.2d _____, _____ N.E.2d _____, is dispositive. The issue in that case was "whether the appellate court was vested with authority to order that respondent be so admitted to probation." The court held "that our Supreme Court Rule 615 was not intended to grant a court of review the authority to reduce a penitentiary sentence to probation." In People ex rel Ward v. Moran, the state's attorney of Christian County was contesting the decision of the appellate court in granting probation to a defendant. The defendant had been initially convicted of theft and forgery and sentenced to concurrent terms of 1 to 3 and 1 to 5 years. On appeal, his convictions were affirmed but the sentences were vacated with directions to admit him to probation. In setting aside the appellate court's order, the supreme court stated that "probation has been a purely discretionary matter vested in the trial court, and the scope of review from a denial of an application for probation has been traditionally limited. (Citations omitted.)"

This court is therefore limited in its review of a denial of probation to ascertain "whether the trial court did, in fact, exercise discretion or whether it acted in an arbitrary manner. (Citations omitted.)" (People v. Salgan, 49 Ill.2d 304,314-315, 275 N.E.2d 381,388.) We hold that the trial court did not abuse its discretion in denying the defendant's petition for probation.

Lastly, we consider the question of resentencing under the new Unified Code of Corrections. Under Illinois Revised Statutes, 1972 Supp., chapter 38, paragraph 1005-8-4, it is provided that if the prosecution of an offense has not reached a final adjudication, the sentence provision under the present law should apply if it is less than the original law under which a defendant was sentenced. In People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1, the supreme court held that a case pending on appeal has not reached a final adjudication.

Since the defendant was indicted for her second violation of Illinois Revised Statutes, 1969, chapter 38, paragraph 16-1, the possible sentence she could have received was 1 to 5 years. Illinois Revised Statutes, 1972 Supp., chapter 38, paragraph 16-1(e)(1), classifies defendant's offense as a Class 4 felony. Illinois Revised Statutes, 1972 Supp., chapter 38, paragraph 1005-8-1(a)(5), notes that the penalty for a Class 4 felony is 1 to 3 years. Therefore, the defendant is entitled to the benefits of the sentencing provisions found in the new Code of Corrections, since

they are less than that found under the old law. People v. Lewis, 9 Ill.App.3d 650, 298 N.E.2d 750.

Thus, under the cited authority the sentence as imposed will be vacated and this cause remanded to the circuit court for imposition of sentence.

We will not consider the contention of defendant that periodic imprisonment be considered as a sentencing alternative. Such was not specifically available to the trial court when sentence was imposed. That court is the proper forum for consideration of such contention. Upon remandment, the trial court may consider the now available alternative of periodic imprisonment.

CONVICTION AFFIRMED, SENTENCE VACATED, AND CAUSE REMANDED.

SIMKINS, TRAPP, J.J., concur.

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE GLENN K. SEIDENFELD, Justice
HONORABLE WALTER DIXON, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On August 21, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 72-203

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

MARY ANN OLSON, Plaintiff-Appellant,	)	Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois.
v.	)	
JON L. OLSON, Defendant-Appellee.	)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Mary Ann Olson, the plaintiff, appeals from that portion of a divorce decree, granted to her on the grounds of mental cruelty, which disposed of certain property rights. Defendant, Jon L. Olson, cross-appeals from the denial of his counterclaim for divorce charging desertion, and from the award of attorneys fees to plaintiff.

We first consider defendant's contention that the finding that he was guilty of extreme and repeated mental cruelty was against the manifest weight of the evidence, so that the counterclaim should have been granted.

Evidence was in substantial conflict, but it must be considered in its aspect most favorable to the plaintiff upon review. (Woodshank v. Woodshank (1971), 2 Ill.App.3d 596, 599.) It has been generally recognized that the elements of mental cruelty consist of a course of abusive and humiliating treatment, calculated or obviously of a nature to torture, discommode, or render miserable the life of the opposite spouse. Conduct to be considered

extreme and repeated mental cruelty must be such as to cause embarrassment, humiliation and anguish so as to render life miserable and unendurable or to cause a plaintiff's life, person or health to be endangered. (Stanard v. Stanard (1969), 108 Ill.App. 2d 240, 249; Howison v. Howison (1970), 128 Ill.App.2d 377, 382.) Whether the misconduct complained of constitutes mental cruelty is primarily determined by its effect upon the aggrieved spouse and the total factual background. (Stanard v. Stanard (1969), 108 Ill. App.2d 240, 248; Moynihan v. Moynihan (1973), 9 Ill.App.3d 520, 524-525.) And the conduct complained of must be unprovoked. Stanard v. Stanard (1969), 108 Ill.App.2d 240, 248; Woodshank v. Woodshank (1971), 2 Ill.App.3d 596, 598-600.

Judged by these standards we conclude that the proof, although in a close case, sufficiently established mental cruelty and that the court's finding for the plaintiff was not against the manifest weight of the evidence.

Plaintiff's testimony is a recount of a number of incidents which in total weight, a particular matter for decision by the trial judge, were abusive, embarrassing, humiliating and rendered this particular plaintiff's life miserable and unendurable with a consequent effect on her mental health. Some of the conduct showed an overconcern with monetary matters at the expense of consideration for the plaintiff's feelings. For example, defendant insisted on a certain will for plaintiff's mother excluding a particular relative at a time when she was to have an operation; he forced his wife to resort to collect calls to call close relatives; and was close in money matters to an unpleasant extreme. He showed a patent disregard for his wife's family. For example, he engaged in noisy scenes in frontof her family the few times they were visiting; treated plaintiff's mentally retarded sister badly in front of others; and unnecessarily worried and embarrassed plaintiff's parents on account of plaintiff's occupation

as an airline stewardess. There was testimony that he was grossly immature and inconsiderate in demanding his wife's attentions. For example, there was testimony that he became enraged and made a scene when plaintiff went fishing with her uncle, or wanted to spend some time with the children in the family; he placed an emergency call over the airlines while plaintiff was in flight because of a schedule change which had caused a delay of which he had been previously notified; and made a scene in front of relatives demanding that his wife come to bed with him. He also, according to the testimony of the plaintiff, exhibited an immature and inconsiderate concern about plaintiff's smoking to the extent that it would include scenes of public and private humiliation, including going through his wife's personal effects, interrupting her work and continually harassing her on the subject. There was other conduct to which the plaintiff testified, such as nagging and inconsiderate sexual demands, on one occasion slapping plaintiff when she protested. There is evidence that plaintiff suffered mentally and emotionally because of her husband's conduct, became withdrawn, very nervous, unhappy and cried often.

There is almost a total absence of evidence of any provocation and it was particularly the province of the trial judge to determine whether the evidence taken as a whole was sufficient to establish the plaintiff's contentions. See Hayes v. Hayes (1969), 117 Ill.App.2d 211, 215; O'Donnell v. O'Donnell (1972), 5 Ill. App.3d 870, 876; Woodshank v. Woodshank (1971), 2 Ill.App.3d 596, 599; Moynihan v. Moynihan (1972), 9 Ill.App.3d 520, 525.

In this view of the evidence, defendant's counterclaim based on desertion is of no merit. Simonson v. Simonson (1970), 128 Ill.App.2d 39, 46.

The supplemental decree disposing of the property rights divided certain joint checking and savings accounts and stocks in

the joint names of the parties equally, and found that each of the parties were to retain certain stocks in their respective names. Twenty acres of land in Minnesota purchased with the husband's funds shortly after the marriage and placed in joint tenancy was in effect given to the defendant. Plaintiff claims that this was error. Defendant testified that he did not know that the property was going to be put in joint tenancy. However, he did not attempt to change the ownership after he received the deed from the lawyer who handled the transaction for him.

It is well settled that property voluntarily conveyed by a husband to his wife, without fraud or coercion is presumed to be a gift even though the purchase money originated with the husband. And the presumption can only be overcome by clear, convincing and unmistakable evidence that no gift was intended. (Baker v. Baker (1952), 412 Ill. 511, 514-515.) The only evidence of lack of donative intent is the husband's self-serving statement that he did not know the deed was going to be in joint tenancy and the fact that he paid the taxes on the property. However, he did not seek to change the deed after he discovered it was in joint tenancy. The fact that defendant paid the taxes is minimized because he apparently controlled all family investments. It is also to be noted that the parties did not have a homestead or any other jointly held realty; that the husband was found to be at fault; and that the wife, after deducting an expense allowance, because she worked throughout the marriage, contributed between eight and nine thousand dollars to the marriage in the nineteen months the parties were together. Under the circumstances the evidence relied upon to overcome the presumption of the gift was not clear, convincing and unmistakable. That portion of the decree granting defendant a special equity in the Minnesota property equal to the purchase price plus taxes and assessments is vacated, title to remain in joint tenancy between the parties.

The plaintiff also contends that the court improperly refused to consider a $1000 certificate of deposit in a savings and loan association alleged in her complaint to be in joint tenancy, and so admitted in defendant's answer. In later motions, plaintiff stated she was surprised that defendant had denied in the hearing on property matters that the certificate existed. At the hearing, defendant testified that his admission of the existence of the certificate in his verified answer was based on the belief that his wife knew more about it than he did. There was no proof presented as to the existence of the certificate and the court did not find that there was such a deposit. We have permitted defendant to conform his pleadings to the proof. (Ill. Rev.Stat. 1971, ch.110,par.46(3); and ch.110A,par.362.) While ordinarily a party may not be permitted to contradict sworn allegations in his pleading by a later amendment (O'Neill v. Chicago Transit Auth. (1972), 5 Ill.App.3d 69, 72), under the particular circumstances of this case when it appears that the property described apparently does not exist, we will affirm the ruling of the trial court in refusing to consider the certificate.[1]

Plaintiff's claim that she should have been entitled to certain expenses incurred in connection with the testimony of witnesses has not been properly presented (see Supreme Court Rule 341(e)(5) and (7)); and is also without merit. See Ritter v. Ritter (1943), 381 Ill. 549, 553; Ill.Rev.Stat. 1971, ch.33,par.15.

---

1 It appears in the record that when defendant denied the existence of the certificate, plaintiff moved for and was granted a continuance to investigate the matter. Although plaintiff filed a post-trial motion, no further issue was made of the certificate until this appeal.

Defendant in his cross-complaint has claimed that the court erred in awarding plaintiff's attorneys fees in the amount of $500 in the absence of evidence of her inability to pay and the defendant's ability to pay them. He does not claim that the amount allowed is not a fair and reasonable figure. We have concluded that on the facts before the court the amount awarded was within the court's discretion. Ill.Rev.Stat. 1971, ch.40,par. 16; Loveless v. Loveless (1972), 3 Ill.App.3d 967, 972.

We therefore vacate that portion of the decree below which granted in effect the so-called Minnesota property wholly to the defendant although entitled in joint tenancy between the parties. The cross-appeal is denied and in all other respects the decree below is affirmed.

Judgment vacated in part and in all other respects affirmed.

GUILD, P.J. and DIXON, J. concur.

13 I.A.3 970

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 18th day of September A. D. 1973, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11949 Agenda 73-149

James Pearl, Plaintiff-Appellant, vs. Hiram F. Probus, Defendant-Appellee.	Appeal from Circuit Court McLean County

---

Mr. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

Plaintiff sought damages for personal injuries occasioned by the alleged wilful and wanton conduct of the defendant arising out of a single vehicle accident. The jury returned a verdict for the defendant. Upon denial of the post-trial motion, judgment was entered and this appeal follows. We reverse and remand for a new trial. While the plaintiff presents four issues for our consideration, we need consider only one - that is that the jury was not properly instructed with reference to the defendant's intoxication.

On the morning of October 24, 1970, the defendant went to the home of the plaintiff and remained there until evening.

They were playing cards and drinking beer. Thereafter, they left the plaintiff's home in Bloomington, drove to the home of a mutual friend in a town some fifty miles distant, and later went with the friend and his wife to a tavern. There they played pool and continued the consumption of beer. They then returned to the friend's home; the defendant returned to the tavern; and the friends later took the plaintiff back to the tavern. Plaintiff and defendant left the tavern in defendant's truck and en route the defendant reached down to recover a cigarette he had dropped and in the process lost control of his car, resulting in a collision with a house and a car. Damage to the truck was extensive.

The plaintiff tendered an instruction (I.P.I. 2d No. 20.01.01) with a sub-paragraph claiming that the defendant operated a motor vehicle while under the influence of intoxicating liquor. Counsel for the defendant objected to the instruction; the objection was sustained and the instruction was refused. In this case, evidence of the defendant's intoxication was substantial and certainly sufficient to warrant the giving of the instruction. The evidence establishing this is to the effect that the defendant had five beers at the plaintiff's home in Bloomington, three or four more at the friend's home, and continued drinking at the tavern, and the number of beers consumed there is indicated at not less than five. Also, the defendant testified that he and the plaintiff

were partners playing for beers at the tavern and that as a result of the drinking that had gone on that day, the plaintiff was drowsy, drunk and intoxicated. Plaintiff in his testimony related that he talked with the defendant after the accident and that the defendant stated to the plaintiff that he, the defendant, should not have been driving. Such statement was made in the context of a discussion of drinking.

We deem the opinion of this court in Shore v. Turman, 63 Ill.App.2d 315, 210 N.E.2d 232, to be controlling on the instruction issue. We there held that it was error to give an instruction on intoxication when there was no evidence of intoxication. We likewise indicated that where intoxication is made a basic issue in the case through specific pleadings and where there is evidence to support the issue, the instruction should be given. We there stated:

> " * * * Drinking, standing alone, cannot be equated with intoxication nor can the use of alcoholic liquor, standing alone, characterize a person as intoxicated. In addition, there must be an impairment of mental and physical faculties with the resultant diminution in the ability to think and act with ordinary care. It is these elements which are negated by the testimony of the plaintiff and four other witnesses. There is no quarrel with the instructions when posited in the proper atmosphere. That atmosphere is not present here. The atmosphere required is some act, action, conduct, appearance, observation, or circumstance shown by the evidence to point squarely to the conclusion, either directly or by reasonable inference, that the conduct of the individual at and before the accident was or may have been affected by the use of alcoholic beverages. * * * "

We note that this complaint as amended charged that the defendant drove a motor vehicle while under the influence of intoxicating liquor in violation of Illinois Revised Statutes 1969, chapter 95½, paragraph 144. Here it was error not to properly instruct the jury, while upon the facts in Shore, it was error to inject the issue.

Although the defense counsel objected to the instruction with reference to intoxication, we note that in his closing argument he stated:

> "If you elect to go out with a drunk and a drunk drops a cigarette and picks it up, is that a conscious disregard of the circumstances? I don't think so and I don't think it shows it in this case. What he's asking you to do is find against his brother-in-law because they went out drinking together one day and they had an accident from their drinking."

It necessarily follows that if that argument is a fair comment upon the evidence, then the offered instruction should properly have been given.

Two other issues presented by this record, if resolved as plaintiff suggests, would result in a new trial and we need not consider them. We find no merit in plaintiff's contention that he is entitled to a judgment as a matter of law. The judgment of the circuit court of McLean County is reversed and this cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

SIMKINS, SMITH, JJ., concur.

72-99

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE GLENN K. SEIDENFELD, Justice
HONORABLE WALTER DIXON, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 72-99

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from Mc Henry County,
	)	
-vs-	)	
	)	Hon. Charles Parker,
FLOYD BRENNECKE,	)	Judge presiding.
	)	
Defendant-Appellant.	)	

PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

In January, 1969, defendant was found guilty of aggravated incest in a bench trial in the circuit court of Mc Henry County and was sentenced to the penitentiary for a term 3 to 8 years. On appeal we affirmed the conviction, People v. Brennecke (1969), 118 Ill. App. 2d 476, 255 N. E. 2d 26.

On June 23, 1970 defendant filed a pro se petition under the Post Conviction Hearing Act (Ill. Rev. Stat. ch. 38, par. 122-1, et seq.) asserting that his constitutional rights were violated in the trial. On July 1st the trial court appointed the public defender to represent him. On November 27th the public defender filed his motion to withdraw which the court allowed on that date. A few days later other counsel was appointed to represent defendant. On January 29, 1971 he also requested leave to withdraw. That motion was allowed and on that date the court appointed still other counsel, Mr. Karl Koch, as defendant's attorney.

On March 26th Mr. Koch filed his petition for leave to withdraw, suggesting defendant's petition be dismissed, together with his brief and argument in support of counsel's petition.

On April 20th Mr. Koch filed a supplemental brief stating that after defendant received a copy of counsel's brief he notified Mr. Koch that he, the defendant, knew of two witnesses whose testimony would provide a complete defense to the charge of aggravated incest; that Mr. Koch interviewed the defendant on April 16th in person who told him that the two witnesses were his wife and his daughter, the alleged victim; that the matters to which these witnesses would testify were known to the defendant and his then counsel at the time of trial and of the appeal; that even if defendant's petition were amended to include these matters (which do not qualify as newly acquired evidence) the petition would still fail to state facts showing a denial of defendant's constitutional rights.

On April 22nd the trial court found that the petition was "purely frivolous" and that defendant was not deprived of any constitutional rights and accordingly allowed counsel's motion to withdraw and dismissed the defendant's petition on the State's motion. It is from that order that defendant appeals. (Defendant has presently been released from the penitentiary on parole.)

Defendant contends in effect that his court appointed counsel failed to comply with the minimum requirements of Supreme Court Rule 651, (c) (Ill. Rev. Stat. (1971) Ch. 110A, par. 651 (c)). That rule in pertinent part requires a showing in the record filed in this court that court appointed counsel for an indigent petitioner "has consulted with the petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and

has made any amendments to the petition filed pro se that are necessary for an adequate presentation of petitioner's contentions."

The record here clearly shows that Mr. Koch consulted with petitioner in person to ascertain his contentions prior to the hearing before the trial court on defendant's petition. (The supplemental brief filed by Mr. Koch sets forth that he consulted with the defendant at the penitentiary after Mr. Koch filed his original brief in support of his motion to withdraw.) In that interview counsel ascertained defendant's contentions and concluded that, even if the defendant's petition were amended to include defendant's statements, it would still fail to set forth facts which would show any deprivation of defendant's constitutional rights.

Those two briefs and the record clearly show that Mr. Koch made a conscientious examination of the trial record, considered all aspects of the defendant's case including the competence of defendant's appointed counsel at the trial, and investigated all of defendant's contentions. The trial court found that "defendant's conviction has not resulted in a substantial . . . denial of any constitutional right "; that defendant "was defended in a knowledgeable and intelligent manner" and "counsel was competent", and that "further pursuit of this petition by attorney Koch or any other attorney . . . would be . . . purely frivolous." We agree. There was full compliance in this case with Supreme Court Rule 651 (c) and with the advocacy standards set forth in Anders v. California (1967) 386 U.S.738, 744-745, 18 L. Ed. 2d 493, 87 S. Ct. 1396. Mr. Koch was

unable to find any violation of defendant's constitutional rights, and in his brief and supplemental brief so advised the trial court.

The judgment of the trial court is affirmed.

AFFIRMED

J. SEIDENFELD and J. DIXON Concur.

72-112

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ, Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On SEP 17 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 72-112

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CATHERINE L. SANDUS, Plaintiff-Appellant,	)	
v.	)	Appeal from the Circuit Court, 19th Judicial Circuit, Lake County.
MIDLANE COUNTRY CLUB, INC., an Illinois Corporation, Defendant-Appellee.	)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Plaintiff sued for injuries sustained when she tripped on a pipe located on defendant's premises. Claiming the verdict inadequate, she appeals from a jury award of $100 and seeks a new trial on the issue of damages.

On Wednesday, September 9, 1969, plaintiff, secretary for the Chamber of Commerce, was working at the hospitality table for the annual golf day held at the defendant club. About 9:30 a.m. her supervisor asked that she join him for a cup of coffee. As she stood and turned, she stumbled over a pipe protruding from the ground, lost her balance and sprained her ankle. She continued to work until 4:00 p.m. On the following morning she went to the hospital for out-patient care where her doctor (Krasner) took x-rays, found no fractures, applied an ace bandage, supplied her with crutches and sent her home. She remained at home for the next two days. On Saturday she went to her doctor and, at her request, he applied a walking cast to her leg. Upon returning to work the following week she experienced

pain in the lower back area and again remained home for two days. On September 25, the cast was removed, the ankle having healed.

Plaintiff testified that because of her continuing back pain, she was hospitalized on September 30 for a period of 46 days and thereafter examined by Dr. Penn and Dr. Gomez; that she was again hospitalized from May 20 until June 23, during which time she was examined by Dr. Rowley and again by Dr. Penn; that in December of 1970, at the suggestion of her attorney, she was examined by Dr. Kane. All of her doctors, except Dr. Kane, testified that they could find no organic pathology to explain plaintiff's complaints. Dr. Kane testified that his x-rays showed a small narrowing of the disc space between L5-S1, but admitted that such narrowing sometimes results from the arching of the back. Dr. Zeitlin, roentgenalogist, also testified, stating that the x-rays, myelogram and discogram taken of the plaintiff failed to disclose any disc pathology. Testimony further revealed that the plaintiff had been hospitalized on three previous occasions because of her back complaints.

Relative to damages, plaintiff testified that she had been unable to work since September 29, 1969, and that her medical bills to date were $7,207.84. Her claimed out-of-pocket expenses attributable to the ankle injury alone were loss of four days wages ($95), out-patient hospital expenses ($40), x-rays ($6), doctor's fee ($73), and pharmacy charges ($26.51), totalling $240.51. Based upon this, plaintiff argues that the jury verdict failed to compensate her for special damages, is patently inadequate, and therefore cannot stand. (See: Kelly v. Reynolds, 132 Ill. App. 2d 1098, 1103 (1971); Stroyeck v. A.E.Staley Mfg. Co., 26 Ill. App. 2d 76, 86-87 (1960).) As the cited cases hold, such conclusion is mandated where it is shown that the jury failed to consider elements of damage clearly proven. However, in a case where the evidence on damages is conflicting or capable of varying inferences, the verdict of the jury will not be disturbed. Ryan v. Hoffman, 7 Ill. App. 3d 621, 623 (1972); Kerbeck v. Suchy, 132 Ill. App. 2d 367,371 (1971); Zielinski v. Goldblatt Bros., Inc., 110 Ill. App. 2d 248, 253 (1969).

In the present case, plaintiff attempted to prove that, in addition to the sprained ankle, the accident aggravated a prior condition of constant pain in the lower back and leg. Dr. Kane diagnosed plaintiff's condition as "lumbosacral disc syndrome involving the lower lumbar spine" and it was his opinion that the incident in question could or might have caused this condition. However, plaintiff's other doctors testified that they were unable to find any objective cause for her asserted ailments. Further, the evidence shows that dating back to 1965 plaintiff has had a history of back and leg complaints and hospitalizations associated thereto. The jury could have justifiably concluded that medical expenses incurred and wages lost because of back and leg complaints were due solely to a prior existing ailment which was not aggravated by any negligence on the part of defendant.

The question remains as to whether the award was palpably inadequate for damages proven with respect to the sprained ankle. While plaintiff claims a loss of four days wages, the evidence shows that the two days missed in the week after the accident were because of back pain rather than the ankle injury; her loss for two days was $47.50; the hospital radiological, and physician's fees for the out-patient visit the day after the accident were $33.50; the cost for crutches and bandages was $12.11. The remaining portion of the amount plaintiff claimed was due to the casting of the leg, the work days lost the following week, medication and a doctor's visits due to back pain.

In separating the damages caused as a result of the ankle injury from those arising out of the back complaints the jury could reasonably have allowed only those expenses necessary and directly attributable to the ankle injury. This was a proper jury function under which the $100 verdict was adequate. See, Altman v. Gregg, (Gen. No. 57071, 1st Dist.) _____ Ill. App. 3d ____ (1973).

Judgment Affirmed.

GUILD, P.J. and SEIDENFELD, P. - Concur

No. 71-296 13 I.A.3 1087

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Wayne County.
vs.	)	
WILLIAM E. LOCKE, JR., Defendant-Appellant.	)	Honorable Randall S. Quindry, Judge Presiding.

PER CURIAM:

The defendant was charged by information with the offense of intimidation. He appeared without counsel in the Circuit Court of Wayne County and, pursuant to a plea agreement, pled guilty and was sentenced to two years on probation with the first thirty days to be spent in county jail. The appeal is based on the alleged non-compliance with Supreme Court Rule 402(a)(4), (b) and (c).

The trial court did fail to comply with Rule 402 (a)(4) because it did not admonish the defendant that by pleading guilty he waives the right to a jury trial. At no time during the hearing did the court use the word jury. In fact, the court's only reference to a trial may have misled the defendant to think that he didn't have the right to a jury trial.

> The Court: And do you understand that you are entitled to have your case heard by the court, if the defendants so wish.

The words "by the court" may very possibly have left the defendant with the impression that he was only entitled to a bench trial.

The trial court also failed to comply with Rule 402(b) which requires the court to determine that the guilty plea is voluntary. The trial court never asked the defendant whether any force, threats or promises other than the plea agreement were used to induce him to plead guilty. This was plain error.

Finally, the trial court failed to determine a factual basis for the guilty plea as required by Rule 402(c). The State maintained that the following colloquy contained a sufficient factual basis:

The Court: Mr. Locke, you are charged with Intimidation, and are you aware that you are entitled to a lawyer if you want one?

The Defendant: Yes.

The Court: You are telling me that you are guilty of the crime of intimidation as charged in this Information, is that correct?

The Defendant: Yes.

The defendant's affirmative answer was nothing more than a statement of a legal conclusion by the defendant that he was guilty. This Court held in People v. Dye, 7 Ill.App.3d 805, 288 N.E.2d 537 that such a statement by the defendant would not satisfy Rule 402(c). The State contended that the Information stated the particulars of the offense and thus established a factual basis. The State cannot prevail on this point, however, because the only remark made concerning the Information was the question to the defendant of whether he was guilty of Intimidation as charged in the Information. In Dye this Court held that a mere affirmative response to the question of whether the defendant was guilty as charged in the Indictment was nothing more than a statement of a legal conclusion. That reasoning also applies in this case.

Reversed and Remanded with Directions.

PUBLISH ABSTRACT ONLY.

No. 71-309

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE HOUSING AUTHORITY of WILLIAMSON COUNTY, ILLINOIS, a Municipal Corporation,	)	Appeal from the Circuit Court of Williamson County.
Plaintiff-Appellee,	)	
-vs-	)	
MARY COLLIER and JEAN COLLIER,	)	Honorable Stewart Cluster Judge Presiding.
Defendants-Appellants.	)	

MR. JUSTICE GEORGE J. MORAN delivered the opinion of the court:

Defendants appeal from a judgment entered by the Circuit Court of Williamson County, in a forcible entry and detainer suit filed by the Housing Authority of Williamson County, a municipal corporation. Judgment was entered in favor of the Housing Authority to recover possession of the premises involved.

Defendants contend that the trial court committed reversible error in forcing them to trial when the issues had not yet been made up.

On June 8, 1971 the Housing Authority of Williamson County filed a complaint in forcible entry against the defendants. The defendants filed a motion to dismiss the complaint on June 28, 1971. On July 23, 1971 the trial court overruled defendants' motion, ordered defendants to plead within 21 days and set the case for hearing on August 24, 1971. On August 13, 1971 defendants filed a motion to dismiss what they described as plaintiff's amended complaint.[1] On August 23, 1971, defendants' counsel filed a motion for judgment on the pleadings and a motion for continuance from the trial setting of August 24, on the basis that she would be engaged in another trial on that day and that the pending motions would have to be heard before a trial could be had. On August 24, 1971, the clerk's office sent a notice that there would be a hearing on September 1, 1971 at 1:30 p.m., without indicating whether it would be

[1] Appellants argue that respondent filed an amended complaint because the court ordered the respondent to furnish the appellants with a copy of the lease between the parties and when the respondents complied with this order this was the equivalent of an amended complaint.

a jury trial, a non-jury trial, or a hearing on the pleadings.

On September 1, 1971, defendants' attorney appeared, stating that she was appearing for a hearing on the pleadings. She further said that she was not prepared for trial because it is her "understanding that motions are heard prior to setting the matter for trial." The appellee's lawyer then stated that the clerk by official notice had notified the parties of the hearing for trial and that no objection had been made by counsel for defendants and that he had gone to a great deal of trouble and expense to be ready for trial.

Counsel for defendants refused to participate in the hearing, and at the end of the hearing the trial judge stated:

> "At the conclusion of the testimony that has been given, it is the opinion of the Court, the Housing Authority has asked for possession and they shall have possession of this unit occupied by Mary Collier and Jean Collier and the Order will be entered evicting them from the premises."

On September 8, 1971 an order was filed denying defendants' motion to dismiss plaintiff's amended complaint which stated that the court had heard arguments on defendants' motion to dismiss plaintiff's amended complaint on September 1, 1971 and denied that motion on said date. A second order denying defendants' motion for judgment on the pleadings was also filed on September 8, 1971 which recited that the trial court had heard arguments on Defendants' motion for judgment on the pleadings on the 1st day of September 1971 which the trial court denied on that date. A third order was also filed on September 8, 1971 giving judgment for the plaintiff which stated that the evidence was heard on the 2nd day of September 1971. However, the court reporter's transcript discloses that all of the proceedings were had on September 1, 1971. In addition, the court reporter's notes do not disclose, nor does any other part of the record disclose, that the trial court ruled on defendants' motions prior to the hearing.

It is elementary that a cause must be at issue by proper pleadings on file before commencing the hearing of evidence. Nichols Illinois Civil Practice, Vol. 3A, par. 32[illegible], p. 76; Gorin v. McFarland, 80 Ill.App.2d 398, 224 N.E.2d 615; Beamesderfer v. Cerm[illegible], 203 Ill.App. 294.

A fair reading of the record in this case indicated that defendants' attorney was justified in assuming that the hearing on September 1, 1971 was just for the

purpose of hearing the motions she had filed. In her motion for continuance she had stated her belief that the case could not be decided until the pending motions had been heard. The notice of hearing sent out by the clerk's office did not notify her that the case was set for trial. She therefore had every reason to believe that the pending motions were being set for hearing, rather than the case being set for trial.

Generally, civil actions become triable as soon as the issues thereon are made up. The fixing of the time for trial rests in the discretion of the trial court and its action will not be disturbed on appeal in the absence of a manifest abuse of discretion. However, a trial judge has no right to force a party to trial before the issues have been made up, especially when the aggrieved party has not been given proper notice of the court's proposed action.

This case had not been pending for a long time nor did it contain a number of granted continuances. On the contrary, less than three months had passed since the original complaint was filed and there had been but two continuances; one by agreement of the parties on June 24, 1971 and the other on August 23, which the appellants believed to be a continuance exclusively for the hearing of motions. The courts zealously guard the right of a litigant to receive his day in court where it has been conscientously sought. In our opinion the trial court committed reversible error in forcing the defendants to trial under the circumstances of this case.

Defendants also contend that the trial court erred in denying the various motions filed by them. We find no error in these rulings.

The judgment of the Circuit Court of Williamson County is reversed and this cause is remanded for a new trial on the merits with directions that it be set before a different trial judge.

Reversed and remanded
with directions.

CONCUR:

Honorable Caswell J. Crebs

Honorable Charles E. Jones

PUBLISH IN FULL.

57499

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.	)	
	)	
P. L. DIMING,	)	HONORABLE
	)	NORMAN A. KORFIST,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:*

P. L. Diming, defendant, was charged by complaint with theft in violation of Section 16-1(a)(1) of the Criminal Code. Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1). After a bench trial he was found guilty and sentenced to one year in the Cook County Jail and fined $500.00.

On appeal defendant contends (1) that the complaint is fatally defective because it fails to allege any unauthorized conduct or mental state; (2) that his arrest was unlawful; (3) that there was improper conduct by the trial judge that denied him a fair trial; (4) that his sentence is excessive and was imposed based upon erroneous statements made during the hearing in aggravation and mitigation.

For a determination of this cause it is only necessary for us to consider defendant's first argument, i.e., that the complaint charging him with theft was fatally defective. For that reason it is unnecessary to have a detailed recitation of the facts. Defendant was tried under a complaint which stated:

> "David Carter complainant, now appears before the circuit court of Cook County and in the name and by the authority of the People of the State of Illinois states that P. L. Diming, 425 N. Avers, Chicago DOB: 1 Nov. 40 has, on or about 10 January 1971--9 P.M. at 7756 W. Madison St., River Forest, committed the offense of petty theft in that he did take (1) .38 caliber Smith & Wesson, 2 inch barrel, revolver--serial number--508554--and One Hundred and Fifteen Dollars United States currency from the person of David Carter in violation of Chapter 38, section 16-1(a)(1). Ill. Rev. Stat. and against the peace and dignity of the People of the State of Illinois."

Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1))under which defendant was charged defines the offense of theft:

> "A person commits theft when he knowingly (a) obtains or exerts unauthorized control over the property of another and . . . (1) intends to deprive the owner permanently of the use and benefit of the property."

Where the statutory definition of a crime includes the intent with which an act is committed as an element of the offense, the intent must be alleged in the complaint or indictment. People v. Edge, 406 Ill. 490, 94 N.E.2d 354; People v. Harris, 394 Ill. 325, 68 N.E.2d 728.

We have recently held that a complaint which alleges that the conduct was committed with the intent to deprive the owner permanently of the use and benefit of the property is sufficient to describe the prerequisite mental state despite the absence of the words "knowingly" or "unauthorized". People v. Geary, 8 Ill.App.3d 633, 291 N.E.2d 13 (both "knowingly" and "unauthorized" were omitted, but the decision focuses on the omission of "unauthorized"); People v. Wilson, 10 Ill.App.3d 48, 294 N.E.2d 1 ("knowingly" was omitted).

Conversely, it has also been held that an information which alleged that defendant "knowingly obtained or exerted unauthorized control" over the described property of another, but which failed to allege the intent to deprive the owner permanently of the use and benefit of the property was insufficient to charge the offense of theft. People v. Haynes, 132 Ill.App. 2d 1031, 270 N.E.2d 63; and see similar holding, as to an indictment purporting to charge attempt theft, in People v. Matthews, 122 Ill.App.2d 264, 258 N.E.2d 378.

In the case at bar the complaint failed to allege any of the prerequisite mental states as described in the statutory definition of theft. The complaint did not allege that the

taking was committed knowingly, did not allege that the taking was unauthorized, and did not allege that the taking was done with the intent permanently to deprive the owner of the use and benefit of the said property. The complaint, therefore, is even more defective than the charges held fatally defective in the Haynes and Matthews cases. The complaint is insufficient to charge the offense of theft and is void.

In view of our conclusion as to defendant's first contention, it is unnecessary to consider defendant's other arguments.

For the foregoing reasons the judgment of the circuit court of Cook County is reversed.

JUDGMENT REVERSED.

* FIRST DISTRICT, SECOND DIVISION.
DOWNING, J., did not participate.

No. 57422

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
vs.	)	
	)	
LEROY CARTER,	)	HONORABLE
	)	KENNETH R. WENDT,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Leroy Carter, the defendant, pleaded guilty on November 20, 1970, to an indictment for armed robbery and was sentenced to five years probation on condition that the first seven months be served in the House of Correction. (Ill.Rev.Stat. 1969, ch.38, par.18-2.) On December 28, 1971, after a hearing on a rule to show cause why defendant's probation should not be revoked, his probation was revoked and he was sentenced to not less than two nor more than six years in the Illinois State Penitentiary.

The public defender of Cook County, who was appointed to represent the defendant on appeal, has filed a motion for leave to withdraw as appellate counsel. The motion, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, states that the only available issue on appeal would be whether defendant was afforded procedural due process of law at his revocation of probation hearing. The brief concludes that an appeal on this issue would be wholly frivolous and without merit. Notice of the public defender's motion and a copy of the brief were mailed to the defendant on November 14, 1972. In addition, on December 7, 1972, this court advised the defendant that he had until January 15, 1973, to file any additional points he might choose in support of his appeal. To date, defendant has not responded.

At the hearing on December 28, 1971, defendant's counsel stated that since being placed on probation, defendant, "according to the Rule," was "arrested on July 18, 1971," and was "found guilty of attempt theft for which he was sentenced to serve a six month period," and he asked the defendant: "Is that right?" The

defendant answered, "Yes." Under similar circumstances where the record showed that at the proceedings to revoke probation it was stipulated that the defendant had been subsequently convicted of the crime of unlawful use of a weapon, his probation for armed robbery was properly revoked. (People v. Faulkner (1971), 1 Ill.App. 3d 657, 275 N.E.2d 293.) Likewise, where, as here, the defendant admits in open court that he has been convicted of another crime committed since his admission to probation, the probation is properly revoked.

We have examined the record and concur in the opinion of the public defender that the argument thus raised is not arguable on its merits and is in fact wholly frivolous and without merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. For the foregoing reasons, the motion of the public defender of Cook County to withdraw as counsel on appeal is allowed and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;
judgment affirmed.

Third Division. Mr. Justice Schwartz did not participate.

RESERVE BOOK

ILL. APP. COURT
Unpub'd. Opinions
Vol. 13, 3d
109787 Copy 1

This reserve book is NOT transferable and must NOT be taken from the library [redacted]

You are responsible for the return of this book.

DATE	NAME		
7/12	Thomas P. Ahrens	329	5400
8/12	James Hardiman		
8/31	B Hodges	10266	
10/15	H Mason 2	372	5900
	B. Renault	346	8230
1/20	W.H. Jil	346	9252
1/20	Hirschstein	FR2	3733
2/26	M Yudell	44	5-500
3/17/77	K.H. Wright	782	8753
4/10/75	Peter Miller	H17	4540
4/17/78	E Wojcik	644	3700
5/14/78	[illegible]	FI6	[illegible]
7/3/78	T Chiellos	641	2626
9/17/78	M. Quarry	FJ6	5500
10/14/78	T Curran	346	7400
3/23/79	[illegible]	641	5050
4/19/79	John Gehin	782	6600
6-16-79	Betty Jane	222	0400
8/21	Gary Reid	329	5477
2/22	Peg Ottfel		
3/6	[illegible]	263	3700
7-19	Earl H Quarry	236	1100
3-20-78	Nolty	782	5925
4-5-78	L Coughlin	FR.2	3773
5-10-78	M Yudell	558	6704
	[illegible]		

ILL. APP. COURT
Unpub'd. Opinions
Vol. 13, 3d
109787 Copy 1